MARRIAGE WITH A DECEASED WIFE'S SISTER

PROHIBITED BY HOLY SCRIPTURE,

AS UNDERSTOOD BY THE CHURCH FOR 1500 YEARS.

EVIDENCE

GIVEN BEFORE THE COMMISSION APPOINTED TO INQUIRE INTO THE STATE AND OPERATION

OF THE

LAW OF MARRIAGE,

AS RELATING TO THE

PROHIBITED DEGREES OF AFFINITY,

With a Preface

BY

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TO WHICH IS APPENDED,

A SPEECH

DELIVERED IN THE COURT OF QUEEN'S BENCH, JUNE 15, 1847,

IN THE CASE OF THE QUEEN *v.* THE PARISH OF ST. GILES-IN-THE-FIELDS,

BY

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PREFACE.

THE object of the writer in delivering the evidence which he was requested to give before Her Majesty's "Commissioners appointed to inquire into the law of marriage as relating to the prohibited degrees of affinity," was chiefly to bring before them the weight of what was said or implied by Holy Scripture upon this subject, and to show how those Scriptures had been understood by the whole body of the Christian Church, down to the Council of Trent. And if people could but bring themselves to think what is the weight of the deliberate judgment of the Church, century after century, from the first, they would not treat this argument so lightly as they sometimes allow themselves to do. It was, at an early period, spoken of as a sacred tradition from the Fathers; and those early traditions in the *whole* Church do express the mind of the Apostles, who had "the mind of Christ." This mind of the Church continued to be expressed in Councils and Fathers, and later by almost all the most thoughtful of the Schoolmen; it was only contravened in an unsatisfactory school, Scotus and certain followers of his, who went so far as to say that "*no* affinity" (not even with a mother-in-law or daughter-in-law) "was against the law of nature, only against the law of the Church[a]." It was the deliberate judgment of the Church, and ex-

[a] Disp. lxi. q. 1.

pressed by thoughtful writers, that Lev. xviii. is part of the moral law and unchangeable, and that the words "Thou shalt not approach any one near of kin," &c. do furnish a general principle, including cases not actually expressed in the letter of Leviticus. One case, at least, not so expressed, *must* be included, since marriage with the daughter is not prohibited, while marriage with the mother is. Even the better heathen detested the incest with the mother. Yet God saw good to lay down the one and omit the other. And it is as reasonable an account as any other, of this omission, to suppose that He willed that it should be omitted, in order that we might not think that the whole range of forbidden relations was contained in those which are expressly, and in the letter, laid down. It can, neither, then be said that cases are omitted, because they are forbidden by nature itself, since cases most abhorrent to nature are included; nor, since purity is the same in both sexes, can any ground be alleged, without destroying that fundamental law, why marriage with a wife's sister should be lawful, since marriage with a husband's brother is not, or why an uncle may marry his niece, since an aunt may not marry her nephew. In this case the marriage which human passion is most likely to court, is forbidden by parity of reason only; that which it would rarely wish for, is expressly forbidden. We cannot tell the reasons why one was expressly named; but it would be a very narrow Pharisaic interpretation of Holy Scripture which would so insist upon the letter, as to conceive every thing, not in so many words forbidden in the letter, to be permitted, although equivalent to that which is forbidden. It is a sort of interpretation professedly borrowed from the Jews [b], and resting upon their authority, yet more like the argument of a Jew with which

[b] Card. Caietan, from whom this principle is adopted (Evidence, No. 1010, 11, 52), is in many respects a very unsatisfactory Commentator.

most minds are familiar, "It is not in the bond," than that of teachable minds wishing to know the mind of God.

It would, in human laws too, be considered as a presumption against a novel interpretation of those laws, that it was introduced under an evident bias. Passion pleads acutely; corruption is very dull to see very evident grounds against it. I suppose it would be imagined to be the very strongest ground against a case being drawn into a precedent, that a judgment in a single case went against the deliberate judgment of all before, and was given under a bias. Much more in Divine laws. Holy Scripture being given by inspiration of God, and written for such as have in their degree the Spirit of God, is understood through that Spirit by which it is given. When then the first precedent in favour of the infringement of what up to that time had been, by the deliberate judgment of the Church, century after century, accounted the law of God, took place through the judgment of a man stained with almost every crime by which human nature has been disgraced, and that to conciliate the favour of princes,—it will hardly be thought, except by the extremest upholders of Papal infallibility, that he was guided in this by the Spirit of God. Yet such, in the person of Alexander VI., was he who, amid the continued protests of eminent Canonists, innovated, in this case, upon the received practice of the Church. This was followed by a Pope, who, whatever may have been his military or political talent, certainly was not one whom the Church could trust in any religious matters, Julius II. His act furnished the ground for the quarrel with England; and although in this case, probably, there was no real affinity, the first marriage not having been completed, the Council of Trent, espousing the side of the Pope, established a power of dispensation, which, except by these two bad Popes, had never been assumed.

Yet the mind of the Church remained, as far as could

be, unaltered. The Council of Trent manifestly discourages the marriage of two sisters. It affirms, under anathema, the disputed power of dispensation; and then, in a very remarkable manner, passes in entire silence over this, the 1st degree of affinity. Of this it says nothing, but goes on to insist on the necessity of extreme rareness of dispensations in the 2nd: "Let a dispensation never be granted in the 2nd degree, except between great princes and for a public cause." If such were to be the urgent cases which alone would allow of any dispensation in the 2nd degree, *à fortiori* was it the design of those assembled in that Council to discourage dispensations in the 1st. The marriage with the wife of the deceased sister is left in reverent silence, wrapped up in that with the sister herself. It is all but forbidden absolutely, since with regard to it dispensations are not spoken of, and in the degree next below it are limited so extremely. This silence is the more marked, by reason of the recent quarrel with England on this very ground. The Council claims to the Church the authority to dispense with certain Levitical degrees, and so, by implication, defends the authority which had been disputed. But, unlike other cases in which any existing practice or teaching in the Church had been questioned, it avoids any specific declaration on the subject. It passes in silence over the very point which had been at issue, as if to prevent its being drawn into a precedent, even while it did not allow the authority of the Pope in this to be questioned. It discouraged the use of that power, while it maintained the power itself.

So strongly has the meaning of this silence been felt, that in the pleadings in the case of the M. de Sailli, it was alleged in the appeal, that "the Council[c] of Trent *forbad* such dispensations;" and Fagnan, "the most esteemed of

[c] Code Matrim. t. i. p. 435.

the Italian Canonists," regards these marriages as absolutely prohibited by the Council of Trent. He says[d], "To this is added the prohibition of the Council of Trent, in that the holy synod, after it had decreed universally, that in contracting marriages, either no dispensation was to be given, or very rarely, decrees as to the 2nd degree, that in it dispensations are not to be granted except among great princes, and for some public cause, and so very evidently implies that in the 1st degree, which is our case [the wife's sister] dispensation is never to be given." This intention of the Council of Trent seems for a long time to have been acted upon. In my evidence (p. 37), I stated that Estius, a celebrated Canonist, who died A.D. 1613, mentioned only one such case in addition to the two previous. Subsequently to this, the Code Matrimonial, cited, in the Evidence[e], to establish the frequency of these marriages in France, shows the reverse. The whole number of cases mentioned in a period extending over a century, is seven. In two of these there had been previous sin; in one of them, that of adultery; a third was allowed on the very ground that the first wife had fallen down dead on leaving the Church, so that there

[d] T. iii. in 4 lib. p. 62, quoted *ib.* p. 417.

[e] The Rev. R. C. Jenkins says, "*Many* instances of the dispensation in the case in question, occurring in the 17th century, are enumerated in the work I referred to before, the 'Code Matrimonial.' *Among them* I find that Le Sieur Vaillant," &c. (Evidence, No. 1034, p. 92.) The instances which he gives are *all* which are quoted in that work. That of the Sieur Vaillant was a case of adultery in the wife's lifetime; that of "the Mareschal Créqui, a very eminent case in the 16th century," was that in which there was no real affinity, on account of the instant death of the 1st wife; in "the great case of the Marquis de Sailli" the dispensation was declared invalid. The seven cases include one of the marriage of two brothers, the result of which does not appear. Four other cases are not mentioned, of marriage forbidden among us, but three were with an own niece, the fourth with the wife's granddaughter (p. 431).

was no affinity; in a fourth, the dispensation was declared illegal in the civil courts; in two others the dispensation was given after the marriage was completed, in which case, practically, dispensations were more readily granted, on account of the evils to be apprehended from the separation. Again, so novel were these marriages at the close of the 17th century (a. 1683), that it could be pleaded against them, that they were forbidden by the ancient councils and ancient laws of France, and that it was one of the essential points of the Gallican liberties, that the Pope could not do any thing contrary to their laws or the canons of their councils. Different facts appear also in these few pleadings illustrative of the rareness of these marriages, and the difficulties put in the way of them. Thus, although the Council of Trent expressly prescribes that all dispensations as to marriage shall be gratuitous[f], it appears that the cost of a dispensation in the 1st degree, *i. e.* of these marriages with the wife's sister, was about 1000*l.*[g] This, of course, was intended to limit them, and did make them impossible to the middling or poorer classes[h]. In one case, a marquis, notwit htanding all the influence which he could use at the court of Rome, had to wait ten years, until the death of Pope Innocent XI., who, it is said, uniformly refused them; and it is said "that a multitude of similar instances

[f] See the canon quoted No. 477, p. 37.

[g] 24,000 livres (Code Matrim. t. i. p. 437), or 23,000 (*ib.* 439). It was alleged that, at first, in the case of the M. de Sailli, 30,000 livres were asked (*ib.* p. 437). At the same time, a dispensation between 1st cousins cost 4000 livres, about 166*l.* (*ib.* p. 396); one, honestatis publicæ causa, 1500 livres, or about 62*l.* In the M. de Sailli's case, the amount of the sum paid was alleged in proof that the dispensation actually applied for was one in the 1st degree.

[h] This is stated to be the case in Ireland now (Evidence, App. No. 45, *f*).

might be adduced[i]." And now, too, the mind of that large portion of the Western Church remains unchanged; and it carries out, in this respect, the practice of the earlier Church, where other circumstances do not seem to them to hinder it. "Abroad," "in [Roman] Catholic countries," it is said by a Roman Catholic bishop[k], "you very seldom find marriages within the prohibited degrees." "I hardly," he says, "recollect such a thing" [as even "marriages of 1st cousins" "in Italy"], "and it is far more difficult to obtain a dispensation." "In England and all countries of mixed religion, dispensations are granted the more readily, so as to prevent mixed marriages." These marriages are tolerated then as the least of two evils. The existing canon of the Church of England represents, in this respect, the better mind and wishes of the Church of Rome, which, but for what seems to her a greater evil, she would wish to see adopted. In the whole extent of the Greek and Russian Church, and all the bodies which in the whole East bear the name of Christ, even those involved in heresy, these marriages with a wife's sister are wholly unknown and abhorred as incest, as in the time of St. Basil, and those before him. Whatever, then, may be the decay in practice, the mind of the three great portions of the Church is in accordance with that of the Apostles, as attested by the universal practice of the whole Church, wherever she was planted in all lands, and which, until a late unhappy period, remained unimpaired.

The greater part of the evidence given before Her Majesty's Commissioners does not touch upon these questions. It is mostly taken up in the attempt to establish two contradictory points, that the present civil prohibition of these marriages is at once nugatory and

[i] Code Matrim. i. 433, 5.

[k] Bp. Wiseman's Evidence, No. 1194, 5.

oppressive: nugatory, in that it has not hindered these marriages[l]; and oppressive[m], in that it has. Not, of course, that the parties who gave that evidence were indifferent to truth; but that they who united to agitate the question, and to bring the civil prohibition into disrepute, were so intent upon their one object, that they took up whatever weapon came in their way, not observing that they were, in fact, confuting themselves.

Again, great pains are taken to show how "respectable" and pure-minded the persons are who desire these marriages; and then, again, it is urged that sinful intercourse[n] is the result of the prohibition to celebrate them; *i. e.* among the rich, all are pure-minded; among the poor, all

[l] No. 124. This witness supposes such unions not to be promoted by their permission in Protestant countries, and that the proportion of these marriages among us is greater than in those countries. This he says, "looking to statistics." The German witnesses tell us that they have *no* "statistics;" that no account of these marriages is kept (see Evidence, Privy Councillor Dieterici, App. No. 26). "There exist no statistical tables and lists respecting the marriage with the wife's sister, these marriages being allowed by law, without requiring dispensation." Dr. Helwig, App. No. 25, "Pres. von Strampf thought it impossible to give even an approximate statement of the average yearly number of affinity marriages" (Add No. 511).

[m] No. 62. 64. 84. "The practical working of the law had, they conceived, *in many instances* been a source of great misery to private families." 100. "I have heard complaints from a *great many* who were not themselves at all implicated; parties who wished to have married, and who were prevented by the law," &c. Add 148, "A great many cases at Sheffield."

[n] "There are eighty-eight cases known to have been prevented by the existing law; thirty-two resulted in open cohabitation." "In almost all the cases reported to me, where parties in that station of life [the poor] have been prevented from being married, they have afterwards lived in open cohabitation." (Evidence of T. C. Foster, Esq., No. 6, 8: add that of J. B. Aspinall, Esq., No. 46; also No. 173-5, 414.) The index gives the two consecutive heads, "Instances, where prevented;" "Concubinage the result."

debased, united only in this one wish! Of the persons themselves I have no call to speak, nor any knowledge. Persons may often be "respectable" in one way, and have a miserably low standard of moral duty in others. Tens of thousands have of late years been ruined by what were, in fact, dishonest proceedings of "respectable" persons in whom they trusted. And so in this case, it appears, on the very surface of the evidence, that neither gross immorality[o], nor marriage against parental authority[p], nor perjury[q], interferes with this reputed respectability.

[o] We are told, No. 103, of "a man of wealth, who keeps his carriage, *much respected*, and who bears a high character as an excellent man and a good citizen; and although he is living in open concubinage with his deceased wife's sister, his neighbours sympathize with him."

[p] Evidence of Anon. Esq., No. 226.

[q] "In the instances of the marriages which took place at Chatteris, were the persons who contracted those marriages received in the same way as they were before, or was there any disgrace generally attaching to them?—As far as my knowledge went, *no disgrace was attached to the marriage* on the part of the persons by whom they were surrounded. I myself felt repugnant to it at first sight, and I discovered that they used to go away, and come to London generally, and return married; having been married either by licence, *consequently by a false oath*, or by banns in some church, necessarily under a false representation." Evidence of Rev. John Hatchard, No. 509, p. 59. The Commissioner reverts to the subject in this same Evidence: 535. "Those marriages, in the cases where licenses were obtained, must have been accompanied with actual perjury; and in every case there must have been a degree of concealment and deception?—Certainly." 536. "Do you think that *that* has an immoral tendency?—Unquestionably. Any thing that has a tendency to lead a person to practices of deception must be demoralizing to the mind." The questions No. 1082—1085 are on this subject of perjury, and show it to have been present to the mind of the Commissioner. Q. 1082 is, "Do you think that the present state of the law tends to cause false oaths to be taken?—I am quite satisfied of that." The following answers state, that such persons having had the nature of the oath explained to them by one surrogate, "nevertheless go to some surrogate who does not put the same question, and make the affidavit, that affidavit being, in fact, false" [and "gross perjury"].

Such marriages as have not been contracted abroad are, among the wealthier classes, mostly celebrated by license, not by banns. It is even urged as a ground for altering the law, that those who break it commit deliberate perjury; and yet it is urged in the very same evidence, that they who commit perjury in order to contract a marriage held by the Church to be against the law of God, are respectable, blameless persons. In the face of the statements as to perjury, elicited by themselves, the Report of the Commissioners says[r], "We do not find that the persons who contract these marriages, and the relations and friends who approve them, have *a less strong sense than others* of *religious* and moral *obligation*, or are marked by laxity of conduct."

Again, it is, of course, impossible to prove that the law, certainly that the law of the Church, *is* a dead letter. The multitude of those who break it has no weight at all to show that multitudes many more are not healthfully restrained by it. It might, in this way, be argued that every commandment of Almighty God is a dead letter. The commandment, "Thou shalt do no murder," is doubtless no dead letter, even in Ireland, even amid its weekly murders, where the murderers, although known, are again and again screened by the population. The commandment, "Thou shalt not commit adultery," is not, God be praised, a dead letter yet, although the breach of it is no hindrance to the male adulterer being received into "respectable society." It is within recent memory how one, who had seduced his deceased wife's sister, being married, and, although the bill of divorce in the House of Lords expressly made her marriage with him illegal, married her abroad, was, after her decease, received into high and respectable society. The English dislike giving pain; and they overlook almost

[r] Report, p. xi.

any thing, when it cannot be mended. They shut their eyes to guilt as long as they can, when it costs them pain to own it; they overlook it, when they can. Of course, there may be much which is amiable mingled with this; in many cases it may be charity and humility, not indifference. But while this is the English character, their mere tolerance of what is amiss is no proof that they would wish their wives and daughters to do what they tolerate; that they do not think things wrong simply because they endure them, and do not refuse to visit those who do them.

Yet here too is inconsistency. Great pains are taken to show that persons in England lose nothing in good repute with their neighbours, although they contract these marriages[s]. Yet, at another time, when it is wished to throw odium on the prohibition, instances are given of parties losing caste[t] by it; or, if the evidence seem not full enough, it is pleaded in excuse, that[u] "only in a few cases one [a solicitor] can get parties to come forward and proclaim this state of things; very many will not; and this in part on account of the possible effect it might have on their wives." What does this imply but a

[s] Two pages of evidence (p. 26—28) out of 159, besides sundry references, are taken up with the evidence as to one nobleman's son. Another witness gives evidence "that this marriage is remembered against them by vulgar-minded and ill-disposed people;" as if it were a good act, which the bad only misjudged (Rev. J. F. Denham, No. 372). The same witness says, "it is remembered, and they are always under a disadvantage, just as every body is who is supposed to lie under a social blot of any kind."

[t] Evidence, No. 81.

[u] Evidence, G. A. Crowder, Esq., the solicitor who conducted the inquiry, No. 216, 7. Add No. 187 and 8, *h*. The Rev. J. F. Denham thinks "these marriages are fewer in agricultural populations, because these are more accessible to the odium of obloquy;" *i. e.* there would be "a blot upon their social position" (No. 389). Another speaks of one expatriating himself in consequence (Anon. Esq., 592—6. Add 590).

secret consciousness of something at least questionable? However those whose conscience is the most tender may, for a time, have silenced its voice, it seems to be apprehended that it is still ready to wake up. Were marriage with a wife's sister, a pious act, in such good repute, there would have been no ground why nine witnesses, called upon to establish this fact, should have desired to conceal their names.

Again, the case of the poor is adduced as a hardship, wherein it is forgotten that as many of them as are members of the Church would remain, as such, just in the same condition as now, and the penalties annexed by the law, relating to property only, do not affect them. We are told, "I[x] hardly think that there is a Dissenter of any class, from their clergy downwards, who does not feel it an unjust restriction, and *act*, accordingly, *in defiance* of it." It is, at least, no hardship, then, on the dissenting poor, and the poor of the Church would not be affected by any change in the mere law of the state. The removal of civil penalties could not, of course, impose any obligation upon the clergy, or set them free to act contrary to the law of the Church[y] to which they have pledged themselves; nor could the state alone change the table of prohibited degrees, under which and the canons the clergy acknowledge these degrees to be "prohibited by the laws of God," "forbidden by Scripture[z]."

[x] W. Paterson, Esq., No. 103, *c.* p. 12.

[y] "I found many of the clergy feel themselves restrained by the canon law" (W. Paterson, Esq., No. 102). "I must confess that the clergy whom I met with were, as a body, in favour of the present law" (*ib.*).

[z] "No person shall marry within the degrees prohibited by the laws of God, and expressed in a table set forth by authority in the year of our Lord God 1563. And all marriages so made and contracted shall be adjudged incestuous and unlawful," &c. (Canons of A.D. 1603). Canon 99, "A table of kindred and affinity, wherein whosoever are related, are forbidden in Scripture and our laws to marry together."

Again, it is urged that the present state of the law interrupts domestic intercourse, and yet one of the grounds assigned as leading to these marriages is "co-residence and confidential intercourse." Whereas, it is, of course, quite plain that the prohibition of such marriages is the safeguard of domestic intercourse; the wife's sister can the more readily be the guardian of her sister's children, when she can stand in no other relation. Ignorance as to the Divine law, and uncertainty as to the human, have been the very hindrances of that tender domestic relation. When the wife's sister is recognized as the husband's own, she is as privileged as his own. This is remarkably recognized by the Rev. J. F. Denham (although advocating the permission of such marriages), as being the case now (Evidence, No. 397-9, 390). The Rev. J. Hatchard, also, taking the same line, admits, "I should think that there is a shield which is thrown over a wife's sister, which is not thrown over another person." (No. 517.) The same ground is strongly taken by Archdeacon Hale, against the permission of such marriages (No. 1273), and Rev. J. E. Tyler (No. 1225-34).

Little specific has been said on the opposite side, in the evidence, upon the topics upon which the writer dwelt,—the prohibition of these marriages in Holy Scripture, and the universal mind of the Church until evil days, understanding those prohibitions to be in force under the Gospel. A few words may be said upon each of those subjects.

Most of those who assert that they believe these marriages to have nothing[a] contrary to the Word of God, content themselves with this assertion, so that there is no evidence upon what ground they rest their belief. Of the two possible grounds, 1st, That marriage with the wife's sister is not forbidden in Leviticus, because

[a] One witness ventures broadly to lay down that the prohibition of such marriages is *against* the law of God. No. 956.

not contained in its letter; 2ndly, That the Levitical law is no longer binding,—it is remarkable that, while the former is the most popular ground, the persons of most name take the latter.

The former is the most popular, because people mostly are timid in relaxing God's law. They wish to persuade themselves that they are not relaxing it, but will not give up their own wishes, which are contrary to its letter or its spirit, and so they persuade themselves that they are not so, and compromise matters by paring it down as little as they can. Single stones are pulled out first; people do not venture to try to shake the whole wall. The thin edge of the wedge is introduced first. Not that they themselves do so advisedly, but they are unwilling instruments in the hands of one who knows better than themselves the minds of men, and the effects of each step in a direction diverse from or against the perfect law of God. He forecasts much more than the next move in his fearful game.

Very remarkable, in this way, is the utter inconsistency of the position which this class are endeavouring to take up. At present, the one object is to gain the one point, that men should be allowed to marry their deceased wives' sisters. Whatever be the secret human agency which, with large means at its command, has set all this machinery at work, first sending private commissioners of its own to investigate the practice as to these marriages, canvassing the clergy for their opinions, taking them sometimes by surprise, getting up petitions, and, at last, procuring a Royal Commission—this has been the object in view. This is visible in the pains taken to show that in the actual breaches of the present law of marriage the cases of consanguinity are few in proportion, and in Germany, also, are less frequent than with the wife's sister. Pains are taken to separate from them marriages which stand precisely upon the same ground as

to Holy Scripture, but on which the English mind is not equally prepared. On any ground of Holy Scripture, whether in itself or as understood by the Church, the marriage of the uncle and niece stands upon exactly the same footing as that with the deceased wife's sister. Both are virtually included in Holy Scripture; both were neglected, at all events, by the rabbins; both prohibitions were enforced during the purest ages of the Church; both relaxed in evil times, by dispensations from the Pope; both continue to be forbidden in the Greek Church; both were, after the model of the Primitive Church, anew forbidden among ourselves; both were discouraged, at first, by the Protestants abroad; both are since allowed by them; one altogether, the other by dispensation from the civil power; both take place, by dispensation of the Pope, in Roman Catholic countries; both practically take place where allowed. It is simply absurd to suppose, that if the English mind is familiarised with the one, the other will be far off.

This broad distinction between consanguinity [b] and affi-

[b] "I see no objection to marriages where there is no consanguinity" (Evidence of Dr. Cox, No. 849; add 853. 1012). The Rev. Mr. Denham, in a note, modifies his statement: "The law of nature and the law of God both prohibit marriages in cases of consanguinity" (No. 411), referring to his pamphlet, p. 41—44, in proof that he holds that the Divine law prohibits marriage within certain degrees of affinity. The only case there mentioned which comes under the "Divine law" is that of the "father's wife;" but even this Mr. Denham looks upon only as an aggravation of the adultery, not as an incestuous marriage (p. 43). He "restricts the prohibition of marrying a mother-in-law to the father's lifetime" (p. 53); and so, even against this the deepest incest, he has no ground except the (varying) law of nature. The very cases which he brings of heathen "horror of such a marriage" (Cic. pro Cluent. 5. Æn. x. 389), were cases of adultery as well as incest. The uncle's wife was not forbidden by the Roman law, which is his test of the law of nature. In other Evidence there is some confusion as to what consanguinity is. One witness calls the marriage of the mother and the daughter, a marriage of

nity, which is implied in many of the questions and by some of the witnesses, is opposed not only to the word of God, but even to the voice of human nature itself, as attested by the better heathenism. The primæval law given by God in Paradise, which our Blessed Lord revived, "They twain shall be one flesh," however defaced or buried oftentimes by man's passions, lived on where the law of marriage was most respected. The provision of the Roman law[a], that a man should not marry a wife's daughter or a son's wife, is founded on the principle that "both are daughters;" the ground of the prohibition of the mother-in-law or step-mother, that "they are in the place of a mother." This reason of the law cuts away the very ground on which the distinction is now attempted to be made. The law of God explains the principle upon which some marriages by affinity are forbidden by the very nature of marriage itself; it brings out plainly that the mysterious oneness of those "whom God hath joined" knits them together indissolubly (except in the case of that special sin which dissolves it), and so, by their own oneness, incorporates each into the family of the other. Holy Scripture applies the principle beyond the first sacred relation of parent and child; but the principle itself God had graven on the human heart by His words to the common parents of all mankind, "They twain shall be one flesh." One and the same principle establishes the great holiness of marriage, its depth of

consanguinity (No. 18). Another regards that with the deceased husband's brother: "In the case of two brothers there might be a natural deterioration of the species, inasmuch as there would be *a close connexion of blood*, which there would not be in the other case." And this he looks on as a reason, "why, among the rest, a man may marry two sisters, and the same woman may not marry two brothers. The objection in the latter case is founded in our nature, which cannot be pretended in the other" (Evidence of the Rev. John Garbett, No. 1062).

[a] See below, in the Evidence, p. 13, note *d*.

mystery, its indissolubleness (except in that one case), excludes in the wife's or husband's lifetime the union of more than one pair, *i. e.* polygamy; and, after the decease of either, prohibits the survivor from marrying such of the relations of the departed as would be forbidden if they were the survivor's own. One and the same Divine principle is the groundwork and rule of all. Holy Scripture insists upon cases under each head with equal weight of authority and of appeal to the conscience. As instances of the one general principle, "None of you shall approach to any that is near of kin," it does prohibit in express terms "the father's wife," "the daughter-in-law," "the brother's wife," "the wife's daughter or grand-daughter." There is no difference in the words of the prohibition, save that, for fear man should sever them, Holy Scripture even more carefully identifies the relation with the "brother's wife," than with the "aunt." Of the father's and mother's sister it is only said, "she is thy father's near kinswoman," "she is thy mother's near kinswoman." Of the nakedness of the brother's wife it is said, "It is thy brother's nakedness," as of "the father's wife," it is said to be "the father's own nakedness." And for those who contend that no law of nature would be broken by marriage with the sister of her whom a man first took to wife, because she is commonly termed a "sister-*in-law*[a]" and not a person's own, and there is no nearness of blood, it would be impossible to say what law of nature would be broken by marriage with the daughter of her whom a man first took to wife, since she also is commonly called a daughter-*in-law*, and with her also there is no nearness of blood. But such special pleading is rebuked by heathen Rome itself, which says, A man shall not marry such, "for both are daughters[b]."

[a] Appendix, No. 16, p. 142.

[b] See Evidence below, p. 13, note *d*. The instinctive feeling comes back again as soon as the question of the lawfulness of these marriages

One may say more. Since Holy Scripture does prohibit not only marriages "near of kin" universally, but a marriage altogether undistinguishable, on any principle, from this of the wife's sister, *viz.* that with the brother's wife, it would be hard to say on what plea this particular case would not be included under the general, so that the same plea should not be equally valid that suicide should not be held not to be included under the general law, "Thou shalt do no murder." Of course, suicide *is* forbidden; as is also gambling. One would not even call to mind the sophistry by which persons have persuaded themselves, that to destroy their own lives did not come under the sixth commandment. Of course there is proof enough for those who will see, even apart from our Christian instincts, or the first principles of the relation of the creature to his Creator. And there is abundance of proof that all reckless waste of wealth is an offence against Almighty God, Who entrusted it to us, and that gambling belongs to covetousness. Yet the proof is really not more direct and constraining than that the prohibition of marriage with the wife's sister is contained both in the general law, "None of you shall approach to any that is near of kin to him," &c., and in the particular application of it, "Thou shalt not uncover the nakedness of thy brother's wife."

I said, above, that one and the same principle is the groundwork of the whole sacredness of marriage. And now, again, keeping as a first principle that sacred law, "They twain shall be one flesh," as excluding the multiplying of wives, I would say more explicitly that it is impossible to adduce any principle either of Holy Scrip-

is out of sight. Thus, a German lawyer, who had set forth the excellence of these marriages, speaks of adultery between the parties as "a case of rare occurrence, as it presupposes a great moral depravity in both parties, in committing an offence of this nature against so near a relative of *both of them*" (App. No. 9, *b*).

ture or of regenerate nature, (for to degraded heathen nature nothing may be unnatural,) whereby polygamy may be accounted to be prohibited, and the marriage with the wife's sister allowed. Beyond question, polygamy *is* prohibited in principle by our Blessed Lord's words, "They twain shall be one flesh," and by the way in which He revives and explains the original law of marriage, from the creation itself of woman, and by the mystery involved in it. But this is the very mystery upon which these marriages are forbidden. The Church has read in our Lord's words the sanction of monogamy, and has held polygamy a sin, as she did these marriages incest. But if people will find in God's word nothing but the bare letter, it might as well be argued that what our Blessed Lord was immediately prohibiting was capricious divorce; that the special permission of Moses for the hardness of their hearts, which He repealed, was (what foreign Protestants allow) to put away a wife for any cause save that which in itself dissevers the mysterious oneness between the man and his wife, and breaks the original law of marriage; and in support of this supposed absence of prohibition of polygamy, the construction of those writers might be adduced who regard the direction, "the husband of one wife," to "mean, that if a person had two wives, he was not required to put one away, or dissolve the marriage; but he was not to be an officer of the Church, not to be a bishop[c]." One speaks, on this ground, of bigamy, as well as slavery, as "both apparently tolerated at first, under the circumstances of the times[d]." But, according to him, it is tolerated by Holy Scripture itself. What authority then can *he*, on *his* principles, produce, whereby it should be forbidden now? Both cases stand on precisely the same ground. Both polygamy and these marriages are prohibited by the principle of the first law of marriage; in both cases God of old suspended, in cer-

[c] Mr. T. Binney (Evidence, No. 995, p. 87, *c*). [d] *Ibid.*

tain cases, His own law, although polygamy began with the accursed race of Cain; polygamy God allowed under the law; and when a man died childless, allowed the marriage with a brother's wife, which else He forbad: but the principle which forbad both, He sanctioned, the one by Moses, the other by His Son; and our Blessed Lord, in reviving that first mysterious law, "They twain shall be one flesh," re-established a principle, which, as He spake it, directly asserted neither, yet threw its light equally over both, and re-awakened our purer, holier instincts; and His Church understood His words, and founded her laws upon them, and shrank from both as violations of nature herself, when rightly understood. It is observable in this respect that one[e] who advocates these marriages speaks of the infamous case of polygamy sanctioned by Luther, Melanchthon, and other foreign reformers, as "one which was held to be a difficult question, even among those most opposed to it."

It is, in truth, a very remarkable part of our probation as to Holy Scripture also, that persons may escape almost any argument or authority from Holy Scripture, if they *will*. The Jews did, and do, as to the Divine Mission of our Lord; misbelievers, as to every doctrine of the faith by turns; careless livers, as to almost every point of practice. Holy Scripture, like its Divine Author, is in the world, and the world knoweth it not; "the carnally minded *cannot*" (itself tells us) "receive the things of the Spirit of God." It speaks to faith, and can be received only by those who "have ears to hear." It is in harmony with our whole trial that it does not compel our faith. Proofs from it are scarcely ever so stringent as intellectual persons would have them. The nets of the Gospel will not keep those who *will* burst through them. The history of all controversy, both as to faith and practice, shows that misbelief, or wilfulness, always finds

[e] Rev. R. C. Jenkins, Evidence, No. 1025.

something upon which, with more or less plausibility, it can prop itself. Be the proofs ever so solidly brought together, those who *will*, can always find some chink at which they can creep out. Believers find proof easy and convincing; every one is astonished at the blindness which sees not the force of proof of what he himself believes. And with reason, mostly. The things are very plain to see; nothing is wanting, but, what is every thing, the *will* to see, or sight. People will be even impatient to be told that there are the same difficulties of proof as to things which they receive, as there are to those they do not receive. Still, in the same way as Bishop Butler pointed out to persons that they could not consistently be Deists; that, if they shrank from being Atheists, they must be altogether Christians; so one must, in each question, venture the risk that some will be consistent in evil, in the hope that the main part will seek consistency, where only it is to be wholly found, in the full truth.

They then have taken a more consistent, although bolder, line, who have denied the binding force of the Levitical degrees altogether. Yet these have their own difficulties; and certainly their line, if adopted, would involve nothing less than an almost universal relaxation of every restriction upon marriage, however near in blood or kindred. It cuts off at once all explicit written Divine law upon the whole subject (for it has been at least probably held that in the case of incest mentioned under the New Testament[f] the father was still alive). Those, then, who cannot fall back, as the Roman Church does, upon a strong ecclesiastical law (as long as this endures), will have nothing to fall back upon but the Divine law, unwritten in tables and ink, but written (as far and where it is written) in the fleshy tables of the heart. This,

[f] 1 Corinthians v. 1.

indeed, will guide those hearts wherein it is so written; but its characters, in most hearts, like so many of His plainest laws, will be filled up and illegible where the written law does not continually clear them to the soul. Still less will its voice within the heart be heard, when desire or strong will clamours against it. Its voice will be least heard where it is most needed. Man needs a Divine law without, to strengthen the written law within. Already, we are told[g], "that among the Roman Catholic laity in England, the question as to these marriages is regarded as one of ecclesiastical discipline."

Of those who deny the binding force of the Levitical degrees, Bp. Wiseman has a remarkable position to maintain,—that these "marriages[h] are disapproved of in the Mosaic law, but not on that account contrary to the Christian law." Accounting them, as he must, as belonging to the moral law, he has to suppose that the Jews, the carnal people, were under a more strict moral law upon this subject than Christians; that the law set forth in this a higher standard of attainment than the Gospel; that, amid the "hardness of heart" of the earlier people, marriages were forbidden to them which are allowed under the light and grace of the Gospel. Professing to rest, as he does, upon tradition, he has to maintain *that* to be a mere "matter of ecclesiastical legislation," which the whole Church for centuries, from the first, accounted to be incest, and the Doctors of the Roman Church deliberately so ruled, as the Eastern Church, maintaining its traditions and ignorant of dispensations, does to this day.

On the other hand, the school[i] in our own Church,

[g] Evidence, 81, *e.* 84, on the authority of two, one "a distinguished" Roman priest.

[h] Evidence, No. 1156.

[i] The Archbishop of Dublin (App. No. 5, *b*), the late Bishop of Meath (*ib.* No. 4, *l*), Mr. Tyler (Evidence, No. 1235, ii.). The same

which says that the Levitical degrees are not binding upon Christians, has the especial difficulty that, on the principles of the English Church, they cannot account those rules ever to have been part of the moral law. Some seem to have forgotten, that the Church of England, adopting the tables of forbidden degrees, owns in her canons, as did the Catholic Church of old, that these marriages are contrary to the word of God. Mr. Tyler (whose name it is a deep subject of regret to have to name in connexion with such a view of the subject) ventures deliberately to state [k], "tremblingly alive to the holiness of the ground upon which" he is "treading," that he "humbly conceives that the law of marriage, *at all events* as to the subject-matter of the present inquiry, is part or parcel of the political or municipal branch of the inspired law of the Mosaic dispensation." "The subject-matter of the present inquiry" (Her Majesty's Commission) is the marriage with the deceased wife's sister or niece. These were understood, by the ancient Church, to be prohibited by the general prohibition (Lev. xviii. 6), and this, of course, includes every, the deepest, incest; and Mr. Tyler cannot suppose this to be part of the municipal law, unless he regards all law as to incest to be such. The other ground upon which it would be regarded to be prohibited, is as being virtually included in the prohibition to marry "the brother's wife," and to this I suppose Mr. Tyler to allude, in his qualification, "*at all events* as to the subject of the present inquiry." I suppose him to mean that, reserving any

ground is taken by Dr. Chalmers (quoted No. 821) among Presbyterians, and Dr. Cox, a Baptist (No. 846). The Rev. J. B. Owen (forgetting, as it seems, Art. VII. "No Christian man whatsoever is free from the obedience of the commandments which are called moral") calls it "part of the *moral* law of a peculiar people under peculiar circumstances." What these are, he does not hint (No. 787).

[k] Evidence, No. 1235, p. 110, ii. *a. g.*

judgment whether certain marriages prohibited in that chapter (as with the mother, or sister, or father's wife, or daughter-in-law,) do or do not belong to the moral law, that with the brother's widow, and, as included in it, that with the wife's sister, certainly do not so belong, but to the political or municipal. It is difficult to say on what ground of Holy Scripture such distinction is made, that some prohibitions of God's word, as to unlawful marriages, should be held to belong to the political law, while others *may* belong to the moral law. All are rehearsed together, one after the other; to all is prefixed the same solemn "Thou shalt not;" all have, both at the beginning and the end, the same solemn sanctions, "Ye shall *not* do after the doings of the land of Canaan, nor walk after *their* ordinances;" "Ye *shall* do My judgments, and keep Mine ordinances." The only plea for any distinction is that a greater penalty[1] is annexed in some cases than in others. But because

[1] Bp. Wiseman says, No. 1158, "Even with reference to this text (Lev. xx. 21), I think it is remarkable, that, whereas there is a penalty attached to all other cases of marriages with kin, in this one there is no penalty, but simply a declaration that from such a marriage there shall be no issue." This is not accurate. The distinct penalty of death is annexed to incest with a father's wife, and daughter-in-law and mother-in-law, and a sister. To incest with an aunt no distinct penalty is annexed; but it is said, "They shall bear their iniquity." They are left to the secret judgment of God. Of incest with the uncle's wife, it is said in like way, "They shall bear their sin; they shall die childless." Childlessness, which among the Jews was a great punishment (see Jer. xxii. 29, 30), is mentioned here as an expression of God's displeasure. When, then, it is said in the next verse, of incest with the brother's wife, "It is an unclean thing; they shall die childless," it would be most unreasonable to say, "This is no penalty." It is not said, "They shall be barren," but "They shall *die* childless." And is it, then, no penalty to lose children one by one, survive the very last, and die childless? It will be recollected how this was felt by our own Queen Anne, and how the loss of her own children brought her conduct to her father to her remembrance.

sins are not equally punished or equally heavy, it does not follow that both are not sins. What Holy Scripture terms "an unclean thing," as it does the marriage with the deceased brother's wife, is surely not a political, but a moral offence. It were, surely, a principle which might lead to the very worst tampering with God's word, if, where the same grounds of prohibition are used, the same general sanctions, men could interpose and say, "*This* belongs, and *that* does not belong, to the moral law." Yet it were too manifestly against the primary instincts of human nature itself, to allege that those earlier commands which forbid incest with a mother or a sister are not part of the moral law. I can hardly think that any one, free from a strong preconceived opinion, could study, as the word of God, the 18th chapter of Leviticus, and not think, as the Church of England has laid down, that the prohibition of the marriages therein contained is part of the unchangeable law of God. The real distinction between that which is moral and eternal, and that which is judicial and temporary, has been well stated by a thoughtful writer[m]: "This law binds us, *as to its substance*, just as it did the Jews; for thus it is something *moral*, and belongs to the ten commandments, although it was purely *judicial as to its punishments*."

But it has been argued by one who thinks this ground could hardly be entertained seriously, "As for the allegations[n] from the Levitical law, if any one brings them forward in sincerity, he should be prepared to advocate adherence to it in all points alike; among others, the compulsory marriage of a brother with his deceased brother's widow."

This is, of course, a mere *argumentum ad hominem;*

[m] Thomas Waldensis, quoted below, No. 471, v. fin. p. 34.

[n] Archbishop of Dublin, Evidence, Appendix, No. 5, *b*.

for it excludes the single case which the advocates of these marriages put forward, the case where there are children by a former marriage. It is also not accurately said, "the *compulsory* marriage with the deceased brother's widow." For the very law itself, while, in this particular case, it encourages such a marriage, leaves the brother free, under a very slight penalty, not to contract it. "If the man like not to take his brother's wife" stands as part of the law; and, in the only instance subsequently mentioned in Holy Scripture, no blame is attached, even to a near kinsman who refused to marry Ruth under this law, on the ground "lest I mar my own inheritance" (Ruth iv. 6). But the injunction evidently had reference to the circumstances of the times. Whatever was the ground of the reason assigned, "that his name be not put out *of Israel*" (Deut. xxv. 6), the very words of the exception limit it to *Israel*. The prohibition is absolute; the exception is restrained to a particular case in the former people of God. Of *this* it might be said that it belongs to the municipal law of the Jews, because it has relation to the division of inheritance, "the succession to the brother's name," the "building up a brother's house," "that his name be not put out of Israel." The *prohibition* occurs amid laws strictly moral (Levit. xviii.); the *exception* occurs in a wholly different place (Deut. xxiv. 5-10), amid laws relating to the civil polity of the Jews. It stands on the same ground as the prohibition to heiresses to marry out of their fathers' tribe. Nothing can be more solemn than the grounds upon which those marriages are prohibited. It is easy to select and dispute about the meaning of a verse, but let any man, with earnestness of mind, read the solemn words wherewith those prohibitions are prefaced and concluded (Lev. xviii. 1-5. 24-30), and then, I trust, he would not dare to say, that what is included therein is not forbidden by God Himself, as being against

the law of nature. On the other hand, the whole character of the law (Deut. xxv. 5-10) wherein the exception is made, is one in no way involving any moral duty[o]. The argument plainly would not stand, that, because prohibitions in the old law, being plainly moral, are binding still, therefore an exception, bearing, on the very surface, not a moral, but a civil aspect, must be allowed also. They, indeed, who would blot the fourth commandment altogether out of the decalogue, would not find difficulty in supposing laws thus awfully sanctioned, to be of a mere temporary nature. To others, sins which seem the least offensive of so black a catalogue, will appear the more abhorrent, because encompassed by others from which all nature shrinks, and by denunciations common to all. As, surely, in the Gospel, we must have been accustomed to feel that covetousness, extortion, and drunkenness, and lying, must be far more hateful to Almighty God than people might, at first, allow themselves to think, seeing that, in 1 Cor. vi. 9, 10, "covetous, and drunkards, and extortioners" are joined with such dreadful company, and, at the close of Holy Scripture, are "all liars" (Rev. xxi. 8; xxii. 15). In one case only in the Christian Church, that of recent converts, has it been allowed, that if they *had*, while unconverted, so married according to the law of Moses, they might retain their wives[p]. But the

[o] This is also stated by the Rev. R. C. Jenkins, No. 1014, although there must be some confusion, since the question relates to *prohibitions;* the only instance given in the answer relates to a *permission.* "Do you consider these *prohibitions* as part of the moral law or of the ceremonial law, or, as some people have divided it, the municipal law of the Jews?" "I think *a portion* of them [the *prohibitions*] belong more properly to the municipal law of the Jews, particularly that [the *permission*] in Deuteronomy on the raising up seed to the brother."

[p] See Evidence below, No. 471, p. 30, as to the case of the Livonian converts, and the provision of the Third Council of Orleans (below, Pref. p. xliii), as to new converts, which was repeated three years afterwards in the Fourth Council.

provision in that one instance, that no such marriages should be contracted for the future, shows the more the mind of the Church, that, while she would not dissolve marriages of this sort, contracted in the time of unbelief and out of the Christian covenant, she held that the positive prohibitions were in their own nature moral, and therefore binding in their own nature; that the exception belonged to the temporary law, which was done away, and so could not be revived.

Still this ground is the only ground consistent in itself, however inconsistent with the tenor and spirit of Holy Scripture, and the judgment of the whole Church during so many centuries and of our own. It is the ground taken by the majority of those who maintain these marriages. And the rest must in time fall to them. Consistency in good or evil is the increasing character of the age. Our national practical character saves us often from consistency in evil. Hitherto, under the protection of fostering influences, which are passing away from us as a nation, but strengthening in the Church, we have shrunk from it. Those agencies still keep back the higher classes as a whole, aided by at least the indirect influence of the Church. But Chartism, Socialism, Pantheism, show what is to be expected as to the civil, moral, religious, condition of the world which throws off the Church. And since lawlessness and "forbidding to marry" are amid the tokens of the world's final decay, every step which trenches upon the Divine sacredness and holiness of marriage is of the more anxious momentousness. We are disinclined to see the consequences of what we are doing. People wish to act blindfold, when they are resolved to act, and doubt what the results may be. And, on that very ground, it is of moment to open their eyes, if we can. An alarming range of lax practice *is* laid open in this, which is the very centre of morals. For if the Levitical degrees are abandoned, there remains

no safeguard (save where and as far as the Church holds her ground), except man's natural instincts. But what are these instincts? Are they one uniform, distinct, powerful voice of nature, making herself heard equally under all circumstances, in every moral or religious condition, so that she cannot be mistaken, nor, without a convulsive shock to nature herself, be disobeyed? All experience tells us the contrary. It is against nature itself to say that our moral instincts do not very materially depend upon our whole moral condition. Such as we ourselves are, as moral or religious agents, such are our moral instincts. These sacred instincts are not a dream, nor a mere creation of custom, because they vary indefinitely in different stages of man's moral being. God forbid! Like conscience itself, they are the Voice of God within the soul, sweeping over the very inmost strings of our moral being, although the sounds be jarring, unharmonious, uncertain, low, when the instrument itself is discordant or unattuned; the sounds are fine, and delicate, and harmonious, then only, when the Finger of God, the Holy Spirit, hath repaired and conformed it anew to that state wherein His Hand formed it, and it yields itself to His touch. God's law without, His Holy Spirit within, and right conduct obeying both, are essential to the perfection of man's highest instinct. Then an instinctive feeling is awakened, which is dormant and stifled, unperceived and unfelt, while overlaid by contrary practice. The highest moral nature is, of course, the truest, because the most akin to God. If by man's instinct were meant what man, under any circumstances, left to himself, must by the force of nature feel, there would be no such feeling. Those who will not retain God in their knowledge, He "gives over to an undistinguishing mind," whereby the very first principles of right and wrong, the moral instincts, are confused. It is the very character of such, not only to do things contrary to the primary affections and principles of human nature,

but to "have pleasure in those who do them." (Rom. i. 32.) Debased human nature loses the very instinct of brutes; purified human nature, hallowed by the Holy Spirit, sees and feels instinctively, not by constraint of law, but through the law written by the Spirit of God in the heart, what is holiest and most conformed to the will of God. Between these extremes human nature is continually ranging, having its whole mind and instincts conformed to God or to the brutes. We see this in all morals. We see a feeling of honour instinctive to the soldier, of tenderness to women, of kindliness to sailors, of truth to those of noble birth. Take, again, a person who has for years cherished any virtue, as honesty, truth, purity; his whole nature will recoil instinctively from what another, even though not wholly depraved, will do almost as a matter of course. The finer sense is acquired or dulled by the opposite practice. One cannot be brought to perceive what is really wrong to have any thing wrong in it: another, without argument or proof, rejects it with abhorrence. Would any one hold that refined feelings are mere matter of convention, the creature of custom, because one of unrefined feelings could not understand them? The very words, *refined*, *unrefined*, imply that the *refined* feelings are those of pure nature herself, when cleansed from the debasing elements which cling to her often, but are not of her. Or, is dross gold or a part of it, or is the dull ore the real, purest, truest condition of gold because gold requires an artificial process to refine it?

This, then, has been the great mistake of those who have defined too narrowly what marriages are against the moral instinct, or (as it was called of old) "the Divine law of nature," that they have taken that nature, not at its best, but well-nigh at its worst. There is no incest from which even civilized human nature, as such, has shrunk. The Persians and Egyptians, most infamous for their incests, were very highly civilized. "The wisdom

of the Egyptians" is marvelled at by modern learning, and acknowledged by Holy Scripture itself. Yet is heathen nature then, in "the times of ignorance" wherein God left it, the ideal and standard of man's best and holiest instincts? Then, is marriage with a father's daughter not against nature, since Solon, the wise[q], permitted it by law, and it became the wont of the philosophic Athenians; nay, they thought it nothing unworthy of their gods themselves, since, with most other abominations, they ascribed it to their very chief god. Take the practice of civilized philosophic nations, even of Athens, and of her wise men; and even the especial sins against nature herself would not be against human instinct.

Another more plausible ground for denying any marriage, except with mother or daughter, to be against nature, has been that men overlooked the great principle that God may dispense with His own laws. Although, then, in order to consecrate the very unity of marriage itself, He willed that all mankind should descend from one pair, and in the first generation allowed that which He afterwards forbade, it was not the less contrary to nature, so soon as He recalled the permission. His command can suspend the laws of moral as well as physical nature; and as He can make poisons harmless, so He could make the union of brother and sister in that generation when there were none besides. Yet as the waters returned to their place, when His command which withheld them ceased, so His moral law of nature flows on undisturbed, when He ceases to suspend it.

[q] See Philo-Jud. in 6 and 7 præc. decal.; Senec. de Morte Claudii. Æmil. Prob. in Cimone: "Cimon had his own sister for a wife, led not more by love than by his country's custom. For the Athenians may marry those born of the same father." See on Minuc. Fel. p. 304, ed. Ouz. Sarah was only Abraham's niece by the father's side, allowed at that time.

Yet on some such grounds there is a great vagueness in men's very theory as to the marriages prohibited by this unwritten law of God in nature itself. Roman Catholic Canonists[r] have been perplexed as to where "the Divine law of nature" comes in, so that the Pope shall have no power to dispense in marriage; they have doubted as to "own sister, half-sister; step-mother, step-daughter;" degrees for the violation of which the punishment of death was inflicted by the law of God: a modern Protestant American lawyer[s] speaks undecisively as to the marriage of brother and sister: in the evidence, an opinion is given that nothing is forbidden by the law of nature, which was not forbidden by Heathen law[t],

[r] See below, Evidence, No. 488, p. 51.

[s] See below, Evidence, No. 488, fin. p. 52.

[t] "I believe that a marriage with a deceased wife's sister is not contrary to the law of nature, because it never was prohibited or decided against by any moralist or legislator of antiquity throughout the world; but every other marriage prohibited by the Levitical code was prohibited by *the Greeks* and Romans as a violation of the laws of nature, independently of the knowledge of revelation" (Evidence of Rev. J. F. Denham, No. 413). So far from this being true, marriage with a half-sister was allowed, as we have just seen (p. xxxiii.), in the most polished nation of the Greeks, the Athenians, and by their wisest legislator. Marriage with a niece came to be allowed among the Romans (see below, p. 13, note *d*). Mr. Denham, in his pamphlet on Marriage with a Deceased's Wife Sister, p. 58, gives extracts from Archbishop Potter, to "save the reader the trouble of reference;" but, in so doing, he omits the statements which make against the view. I will give the passage from Archbishop Potter, marking by Italics the passages omitted. Mr. Denham must subsequently have forgotten them, and so made his statement before Her Majesty's Commissioners. Archbishop Potter begins (Antiq. iv. 11): "Most of the Greeks looked on it as scandalous to contract within certain degrees of consanguinity. Hermione, in Euripides, speaks of the custom of brethren marrying their sisters with no less detestation than of sons marrying their mothers, or fathers their daughters." Then, after a statement as to the Persians and their Magi, adds, as Mr. D. quotes him, "The Lacedæmonians were forbidden to marry any of their kindred, whether in the direct degrees of ascent or descent: *but a collateral relation hindered them*

taking Heathenism as the sound exponent of our moral nature.

But, from their very nature, there is no disputing about instinctive feelings. Where they exist, they are a constraining law to the soul itself; but they cannot be attested to those without. They are adaptations of principles of human nature or of the law of God, which they in whom these feelings sleep cannot perceive until they are awakened. They are true, but not demonstrable to those who have not that moral sense to which they can be demonstrated. They are moral axioms, which, if not intuitively perceived, cannot be proved. To those who have not that moral sense, they must appear unreal; and they who act not on that sense, lose it. Contrary instances are proofs, not that there are not any such real instinctive feelings, but that they have been lost.

What then are Englishmen trusting to, while sweeping away, as far as in them lies, all which stands in the way

not; for nephews married their aunts, and uncles their nieces, an instance whereof Herodotus gives us in Anaxandridas, who married his sister's daughter. The marriages of brothers and sisters were utterly unlawful, though countenanced by several examples of their gods: an ample account thereof may be seen in Biblis's words, when in love with her brother Caunus, where, notwithstanding the greatness of her passion, she confesses that no examples were sufficient to license her incestuous desires. *Yet it was not reputed unlawful, in several places, for brothers to marry their half-sisters; and sometimes their relation by the father, sometimes by the mother, was within the law. The Lacedæmonian lawgiver allowed marriages between those that had only the same mother, and different fathers. The Athenians were forbidden to marry sisters by the same mother, but not those by the same father, as we are told by Philo the Jew. An instance thereof we have in Archeptolis, Themistocles' son, who married his sister Mnesiptolema; as likewise in Cimon, who being unable, through his extreme poverty, to provide a suitable match to his sister Elpinice, married her himself. Nor was this contrary to the law or customs of Athens, as Athenæus is of opinion: for, according to Plutarch's account, it was done publicly, and without any fear of the laws. Cornelius Nepos likewise assures us, it was nothing but what the custom of their country allowed.*"

of these marriages, whereon certain minds are earnestly intent, when neither the law of God nor the law of the Church are to be any longer binding? to what but to their own domestic habits and the sacredness of domestic relations, which are guarded by those very fences which it is now attempted to break down? It is not simply English feeling which makes an uncle a second father to his niece, and regards his brother's very child, his image and likeness (Gen .v. 3), almost as his own. It is not English feeling alone which extends the bands of sisterhood and brotherhood, so that the husband's or wife's brothers or sisters, or the brother's wife or the sister's husband, should be joined on to that smaller family, originally given by God, and through the oneness of Christian marriage, be near akin, brothers and sisters in love, though not by blood. It is English feeling, purified by the marriage-law of the English Church, which has become a second nature. But that second nature may be laid aside as well as gained. Each prohibition is a fence to that which lies beyond it; each relaxation lays the marriage next beyond it open, and prepares the mind for it. It is but wilful blindness which imagines that in an inclined plane it can stop in its descent when it wills, and find some private nook for itself where to check itself.

It would be to deny facts of human nature itself, to question that there has been, and still is, extensively, an instinctive feeling, (supported or even brought out by the Divine law, yet existing in the soul itself apart from the external command of the law, the conscience bearing witness to it,) that the sister of the wife is the sister of him who is one flesh with the wife. Let people account for the fact how they may; be St. Basil's language grave rebuke or "asperity[u];" be the fathers, ancient bishops, schoolmen

[u] Evidence of Rev. R. C. Jenkins, No. 1015.

what else they may; be the many millions of the Eastern Churches unenlightened or no, they are at least this, witnesses to the fact, that human nature may shrink with abhorrence, as contrary to its very primary dictates and incestuous, from unions which people in these days are labouring to legalize. Even now such a feeling exists extensively among ourselves. It is admitted that there is a strong *primâ facie*[x] feeling against them. The very report, although the bias lies to the abolition of the law, admits that "the[y] prevalent feeling of the laity of the United Kingdom is against these marriages, and that a large majority, if asked their opinion without time for consideration, would express a very strong dislike and disapprobation of them." This feeling exists not in the Church[z] only, but among the Presbyterians of Scotland[a]

[x] Evidence of Rev. John Hatchard, No. 530.

[y] First Report, p. vii.

[z] "In Ireland, notwithstanding the silence of the statute law, such marriages have been held in much greater abhorrence than in England. I know of only three or four in my long life; and the couples so united were cut off from all society, and even from the acquaintance of their nearest relations. And yet still I am bound with shame and grief to confess that such marriages were legal" (Letter of the present Bishop of Meath, App. No. 44, p. 156). On the opinion of the clergy of Ireland, see App. No. 30, sqq., especially the very valuable petition prepared by the Vicar-General of Dromore, with the approbation of the Primate and the late Bishop Mant.

[a] "Such a marriage, generally, is held by the people of Scotland in very great abhorrence. It *may be* from mistake with respect to its being prohibited by Scripture, when it is really not so prohibited; but still, whatever may be the origin of the feeling, it is a feeling that does exist" (Right Hon. A. Rutherfurd, Evidence, No. 1141, *f*). "I do not think that persons in the better classes would be received in society, having made such a marriage; and I should think, that in the lower orders the impression against it was very strong indeed. It is very strong with respect to what is ordinarily the crime of incest" (Evidence, No. 1148). And we are further told (No. 1151), that it is "certainly the feeling of the people themselves, not the penalties of the law of Scotland, that prevents these marriages." "Among the

and Ireland, who, we are told, look upon these marriages with "very great abhorrence," and as "unseemly." This feeling is at present so wrought into the minds of the people of Ireland and Scotland, that, although not civilly illegal to the Presbyterians, and allowed in Ireland to the Roman Catholics [b] by dispensation, we are told these marriages are held in abhorrence by both. Of course, they who have not this feeling themselves, cannot appreciate it in others. It seems to them arbitrary, artificial. But so, in like way, what to them still appears contrary to nature, as the union between uncle and niece, appears natural to the civil authorities in Protestant Germany, who dispense with it. It takes place commonly among the high, noble, educated; and the beautiful half-paternal relation is dissolved. C'est le premier pas qui coûte. Having cut the

Presbyterians of Ireland, there is a very strong opinion against these marriages. That public opinion is, no doubt, derived from Scotland, and prevails throughout the whole Presbyterian Churches in Ireland, upon the supposition of their being unscriptural" (G. Mathews, Esq., Evidence, No. 1111). "Marriage with a deceased wife's sister takes place very seldom among Presbyterians in Ireland, and such a connexion is generally disapproved of by them" (William M'Clure, Moderator of the General Assembly, App. No. 28). "When such things [a widower marrying his last wife's sister] do happen, as they occasionally do, I am aware they are viewed with great *abhorrence*, both by the friends of the parties, and by the public; and I am quite sure that a clause introduced into the Marriage Act, to prohibit such *unseemly* connexions, would be hailed with universal approbation" (John Montgomery, Moderator of the Remonstrant Synod of Ulster, App. No. 29).

[b] "The moral feeling of this country, as well amongst Roman Catholics as Protestants, is almost universally opposed to such marriages, and, in my opinion, that feeling, even in a more doubtful case, is deserving of respect. I shall merely add, that, although some men will speak lightly of a marriage with a wife's sister, the parallel case of a marriage with a brother's wife would not be tolerated in virtuous society" (Letter of Rev. M. Perrin, App. No. 45, *g*). In the Index to the Evidence, p. 163, there is a head, "Roman Catholics (*Ireland*), tendency of their opinion," &c. It should be *England*.

first knot of the law, to unravel all the rest is comparatively easy. Have Englishmen alone the power to stop where they will? Have they a privilege of their own to break down the first barriers, and then to stop inconsistently, although they shall have put it out of their own power to plead either the Divine law, or the rule of the Church, or instinctive feeling, which they would (only God forbid it still!) have already violated, as a ground against further changes? We have standing-ground now; where would it be, if the nation abandoned what it has?

One ground (blessed be God!) there is, at least within the nation, and more and more taking possession of it,—the English Church. This mingled assault against the law of the State may, by God's mercy, only bring out the more the consistency and wisdom of the law of the English Church; and, like so many other assaults upon outworks wherein we trusted, lead us back from leaning on that which is human, man's law, to that which is Divine,—the law of God, as witnessed by the Church. It is very remarkable that we have such distinct evidence that the Church nearest the Apostolic times did take exactly the same line as that now adopted by the English Church, understanding that to be forbidden by the law of God which we hold now to be forbidden, and forbidding nothing beside. In the early Church, as now among ourselves, we find the marriage with the niece and sister-in-law condemned and abhorred as incest; the marriage of 1st cousins prohibited by no Divine or ecclesiastical law[c]. The ancient law of the Church in the time of St. Augustine drew the line of forbidden marriages just where the Church of England, after her example, draws it, namely, where the law of God, not tied down to the letter, but understood in the spirit, leaves it. Against marriages just beyond this, between 1st cousins, there was a strong feeling prevalent, and experience (we are told) was against

[c] See Evidence below, No. 444, sqq.

it[d]. But it was left, as with us, to the discretion of individuals. The Church of England, then, puts forth no insulated claim of authority; and although her line is in these days distinct, in that she requires all which the word of God in its spirit requires, and adds nothing of her own, still she does herein agree with the whole Primitive Church, which must best have known (as in her Homilies she often repeats) the mind of the Apostles, and, through them, of Christ.

This consent of the early Church, and the extreme lateness of the innovations by dispensation, have been inadvertently glossed over in some of the evidence lately given before Her Majesty's Commissioners; and it therefore becomes necessary again to revert to the subject.

1. Of some of the evidence, it is only necessary to state that such was given. Without any disrespect to individuals, one cannot but regret that they should on such an occasion have given an opinion upon subjects which it has not fallen within their line of duty to investigate. It is no blame to a person not to know what was the judgment of the early Church upon any given point, if he be not called upon to know it; but when a very grave, moral question is to be decided, it is a moral wrong to give any unconsidered opinion which may in any way influence it. The effect of the little which is said upon this subject is but to obscure the truth. For it is natural to suppose

[d] It may illustrate what is said by St. Gregory (Evidence below, No. 461, p. 19), that the offspring of the marriage of 1st cousins do not thrive; that the question has, in our days, too, been put as a case of conscience, in consequence of observing in how many of these marriages sorrow had followed as to the children, especially in their idiotcy. Women, especially, very generally express apprehension as to these marriages. As far as common observation goes, it seems that the number of idiot children born of 1st cousins, are out of proportion to those so born in ordinary marriages. There is a remarkable saying of Aristotle (ordinarily quoted by the schoolmen) against marriages of consanguinity, that love becomes too intense, where the love of marriage is added to that of near kindred.

that Her Majesty's Commissioners, in making their inquiries, selected those persons whom they judged best qualified to give information on the subjects on which they inquired of them; so that what is stated in answer, apart from any intrinsic weight of its own, comes in a manner recommended by them. It is, then, a serious evil when one witness, who is not likely from the tone of his theology to have studied Christian antiquity, is asked "If those marriages, in your opinion, are not prohibited by Scripture, are you at all aware that they were prohibited by any authority in the early Christian Church? —I am not aware that there was any prohibition of the kind[e]." For it is not every one who knows that such marriages were so prohibited, although this witness is not "aware of it."

2. Again, another witness admits unhesitatingly this fact, of which the other was "not aware," yet states his belief that the early Church was mistaken, as resting upon an untrue interpretation of Lev. xviii. 18. "Do you apprehend that at an early period of Christianity a construction was put by the Church upon any passages of Scripture, to the effect that such marriages ought not to be allowed? —Unquestionably. I believe that the general construction of the Church, and of commentators, has been in opposition to such marriages, founded upon what I humbly believe to be a mistaken view of the passage in the 18th of Leviticus, and the 18th verse[f]." Yet it may be stated confidently that *no one Father does rest his objection upon that verse.* The passage upon which they rest is that containing the general principle, ver. 6, "None of you shall approach to any one that is near of kin to him, to uncover their nakedness," under which this particular case falls, and the parallel case of the marriage with the brother's widow[g].

[e] Dr. Cox's Evidence, No. 848.

[f] Evidence of Rev. John Hatchard, No. 516.

[g] See below, Evidence, No. 471.

3. Again, another witness is made to infer that the Bishops in early times gave dispensations in these cases, *because* Councils had so often to prohibit them. This witness had said truly, "I find in the French Church the prohibitions so frequently repeated, that no doubt they [these marriages] were greatly restrained there" (A. 1035). He is then asked, "Must there not have been a practice of granting dispensations to contract these marriages, to have called forth these prohibitions?—It appears so by the very constant succession of these decrees of Councils. You find them in 305, 314, 370, 517, 538, 578, and so on, at different periods near one another[h]." Now, as he had just stated, "I believe that the power of dispensation remained in the Bishops, and afterwards became vested in the Popes;" this would be as much as to say, that the care of the Bishops in Councils to prohibit these marriages is a proof of "a practice" on the part of these same Bishops "to grant dispensations" out of Council. Of course, the re-enactment of a law is proof of nothing except a disposition to break it. But, apart from this manifest contradictoriness, the fact itself is inadvertently misrepresented. Even in a book, the years 305, 314, 370, 517, 538, 578, hardly look like a "*very* constant succession of these Councils;" since between 314—517 (for in A. 370 there was no Council on these matters) there is a gap of 200 years. But what, when in history the Council of A. 305 is in *Spain* (Eliberis), that of A. 314 in *Asia* (Neo-Cæsarea), (in A. 370 S. Basil only drew up penitential canons, allotting the terms of penitence for various sins,) that of A. 517 was in *France?* One would almost expect those who so argue, to turn round, and argue from the fewness of these prohibitions, rather than from their "very constant succession." The prohibitions thus far are in three different countries, two of them provincial Councils, that of S. Basil extending throughout

[h] Evidence of Rev. R. C. Jenkins, No. 1036.

the East. In one part of the Church (the French), we do find at the close of this period, not these only, but other incestuous marriages also, again and again forbidden. Such are the father's wife, the wife's daughter or grand-daughter, the aunt, the uncle's widow, the daughter-in-law. No one of the later Councils relates [i] to the incest with the brother's wife or the wife's sister only. Nor are they mostly mere repetitions of one another; but the later increase the severity of the punishment [k]. We need not be surprised at the fre-

[i] The First Council of Orleans (A. 511, Can. 2), the first known French Council which has a canon on this subject, forbids these only.

[k] The Council of Epaune (A.D. 517, 30 Can.) has a general provision that none incestuously married should be forgiven until separated. This canon refers generally to those "whom it is grievous even to name," and specifies (besides the brother's wife and wife's sister) the father's or uncle's wife, or wife's daughter. It is the first which forbids the marriage of cousins (see Evidence below, No. 460). The Second Council of Orleans (A. 533, Can. 10) forbids, under anathema, marriage with the father's wife, and this only. The Council of Clermont (Arvern. A. 535, Can. 12) adds to that of Epaune, that such were to be excluded from Christian worship and board as also from Communion. The Third Council of Orleans (A. 538, Can. 10) provides that such marriages, contracted in heathenism or in ignorance of the Canons, should not be dissolved; else it enforces those Canons. The Second Council of Tours (A. 567, Can. 21) notices the plea of several, that, through the negligence of their predecessors, they had not known it; this plea, they say, is false, and that they diligently taught what the Holy Scriptures attest. Still they think right to bring together what had been said, that it might be rehearsed to the people. They then embody part of Lev. xviii., Deut. xxvii., Cod. Theod. de inc. nupt., and the Canons of the Councils Aur. 1. Epaon. and Arv. The Council of Mascon (A. 585, Can. 18) threatens heavier penalties. The Fifth Council of Paris (A. 615, Can. 14) requires "very evident separation" of the incestuous parties. That of Rheims (A. 625, Can. 8) excludes from some civil offices, and transfers their property to their relations until they separate. The Council of Metz (A. 753) imposed a fine, and in default, imprisonment. The Third Council of Paris (A. 557, Can. 4) names the aunt, the daughter-in-law, and the wife's grand-daughter, which had not been specified before.

quency of these enactments, since we know that religion was at this time at a miserably low ebb in France[l]. But any argument drawn from the fact of the repetition of these injunctions, to mitigate the sin, must prove too much, unless any be prepared to think lightly of incest with the father's or the son's wife. It may also not occur to every one who has not the acts of the Councils at hand to read the Canons for himself, that these provisions are not *the* objects for which the Councils were convened, but are made among others. Other Councils[m] simply enjoin, in general terms, the observance of the canons before enacted on this subject. To us it can be nothing new, that Canons not re-enforced, virtually lose much of their power. Lastly, there is absolutely no proof of any dispensation whatever as to these marriages for above nine centuries after the last of the Councils here enumerated, by Alexander VI. (died A. 1501); there is no instance of any such dispensation till the close of the 15th century of the Christian Church.

4. There is yet another argument of the same sort as to dispensations: "The[n] canons of Neo-Cæsarea and some other early Councils of that period mention it [the marriage of the wife's sister], not so much as among the

[l] "In France, either through the number of outward enemies, or the negligence of bishops, the power of religion was then almost extinct. There remained only the Christian Faith: for the remedies of repentance and love of mortification were scarcely found, even in a few places, among them."—Jonas, Vita S. Columbani, Acta Benedictin. t. ii. p. 9.

[m] The Fourth Council of Orleans requires, that, if any neglect the provisions of the Third Council, three years before, the penalties of the Council of Epaon should be enforced. The Third Council of Lyons (A. 583, Can. 4) simply requires that the old Canons on this subject should be kept, as does that of A. 743 at Lestines. The Council of Auxerre stands alone in making short Canons on this subject, yet adding nothing new (A. 578, Can. 27-32).

[n] Evidence of Rev. R. C. Jenkins, No. 1017.

prohibited things, as among those errors to which penance was assigned, which appears to leave it *in the case of a thing dispensed with;* a dispensation, more anciently, being *merely a relaxation of canonical penance* (Van Espen de Dispensationibus, iv. 6, 2)." In other words, because a penance of five or seven years was imposed upon those who had so offended, *i. e.* the parties were severed from the congregation of the Church, and placed among the public penitents and excommunicated,—it was a thing not prohibited; and because some held that dispensations generally, *if ever given of old* (Van Espen is speaking of nine centuries), *were* MERELY *a relaxation of canonical penance* (*i. e.* a relaxation of the punishment of an offence, "*not*" a permission to commit it); therefore these marriages were "things dispensed with," *i. e.* things permitted to be done. It is first assumed, wholly without proof, and *contrary to the mind of the author cited,* that there were then any dispensations as to these marriages; and then that a *mitigation* of the punishment of a sin is a permission to enter upon it and continue it. The sentence of death in the civil courts is often mitigated into transportation; but it does not follow that the act whose punishment is so mitigated is not regarded as a crime. Van Espen's words are, "No one ever so little versed in ecclesiastical history and the ancient discipline of the Church is ignorant how very tenaciously the ancient Canons were kept, and that there was the utmost difficulty in dispensing with them; so that some, and they not slightly practised in the acts and writings of the ancients, assert that during very many centuries *no permission to infringe a canon was ever given,* but that dispensations, *if any were given,* were only relaxations of canonical punishments." This is a general maxim as to *all* the Canons of the Church. Van Espen proceeds to the special case of marriage. "And to come nearer to our subject, so rigid was, *even in the* 10*th century,* the observation of the

canons which forbad marriage between those near of blood or affinity, that Gregory VI. thought it better to lay all France under an interdict than to allow a marriage between Robert, King of France, and Bertha, mother of Count Otho, godmother of Robert; in which case there was only a spiritual relation, and the hindrance belonged to the positive law only; so that one may marvel that Gregory VI. and the French Bishops excommunicated the king and laid the whole kingdom under an interdict." Such a state of things is very different from the early centuries; yet such is the evidence from which this witness infers that in the early centuries marriage with a wife's sister was a thing dispensed with.

But to go back to the Councils. This witness states, "The Canons of Neo-Cæsarea, and some other early Councils at that period, mention it, not so much as among the prohibited things, as among those errors to which penance was assigned." Let us hear the Canons of the Councils themselves. The Canon of Neo-Cæsarea relates to the marriage of a brother's widow, although one Latin translation of the Canons adds to the heading the parallel case of the wife's sister. The Canon is, "Let her who has married two brothers be expelled for life. But if at death she promise to dissolve the marriage, should she live on, she shall be admitted to repentance; but if one party die, penance shall be with difficulty granted to the survivor." The Canon is against obstinate offenders, who *would* continue in this incestuous intercourse; it is added by way of comment by some, "not being persuaded to dissolve the marriage." They who persevered in this marriage were shut out of the Church until death; at death, one who promised repentance if she should survive, was received back to communion; and if she lived, was admitted to public penance. To break off the sin voluntarily was the token of repentance; if either party died while the sin was continued, there

was to be greater difficulty in receiving the survivor to public penitence, because he or she could not give the proof of repentance which attests it in the sight of man, —willingly to break off the sin. But is it, then, nothing to be put out of the Church of Christ; to be shut out from communion, and from the congregation and public prayer; to be regarded "as a heathen man and a publican;" and at last, if admitted, to be admitted on public penance? Certainly the Church of England (Art. XXXIII.) does not so regard it. The only other Council of this period which mentions these marriages, that of Eliberis (A. 305), annexes the same penalty to this marriage as to an aggravated case of repeated fornication, or of once falling into adultery,—to be kept from communion for five years; whereas that sinful anticipation of marriage so justly complained of among our poor, it punishes with one year only, and without public penance. In like way, the penitential Canons of St. Basil prescribe the same length of penance as for less aggravated cases of adultery[o]. Not until the seventh year after the incest was discontinued, were they admitted to holy communion. The six years they passed in the several stages of public penitence[p]. But the whole objection is founded upon a false view of these Canons. They are not employed in laying down *what* is sin, but in annexing penalties to what was acknowledged to be sin. The Councils of Eliberis or Neo-Cæsarea, or the Canons of St. Basil, did not first make these incests to be such. This St. Basil says they received from their fathers. But when some persons ventured upon them, then punishment was annexed to them, as well as to other notorious sins. Had the Canons been a simple prohibition of the sin, we should have been told, that these marriages were now for the

[o] Can. 61. 14. 69.

[p] Ep. 217. ad Amphiloch. Can. 77. 98.

first time prohibited. Now that it is assumed in the canon that it is a sin, and the punishment only is annexed to it, we are told that it is "not so much mentioned among things prohibited, as among those errors for which penance is assigned." By the same rules, neither would murder, adultery, perjury, nor any other sin. The Church has only spiritual punishments. But would it be thought no severity now, if a person were enjoined to place himself for six years among public penitents, with fornicators and adulterers, and only at the close admitted to communion? People speak of canons as dead letters. Let them imagine themselves living when they were acted upon; let a person picture to himself Christians, living, acting, feeling, in St. Basil's time, and he will not use such arguments as these.

5. Again, whereas one witness stated that the marriage with the sister-in-law is not contrary to nature, because not prohibited by heathen legislators, especially those of heathen Rome and Greece, this witness contends that it is of civil, not of religious, origin, because it *was* so prohibited. We are told, circumstantially, "I [q] will state, as briefly as possible, the source from which I think the prohibition was derived in the Christian Church. From the Institutes of Gaius it was introduced into the Justinian Code. It became, by that means, a part of the law of the whole empire, and, of course, the law of Christians, who, after their conversion, obeyed the marriage law of the empire." And the inference from this is there stated: "The fact that the prohibition against such a marriage contained in the law of the empire was binding upon the Christians, as a civil obligation, prevents us from clearly discerning whether they observed it also as a Christian precept." Both arguments, of course, cannot be true; and the fact upon which this is founded,

[q] Ibid. No. 1015.

however confidently stated, is the reverse of the truth. It is certain, that the ancient Roman law did not prohibit these marriages. The empire did not prohibit them until itself had become Christian. In this, as in other legislation, *e. g.* as to the Lord's day, the civil power made that illegal which the Church had forbidden as unlawful. In all, held as this was to be forbidden by the law of God, the state followed the Church, not the Church the state.

6. The earnest, high-toned letter of St. Basil, in which he expresses his abhorrence of these marriages, has already been frequently mentioned. It was written to one Diodorus, who (in St. Basil's indignant language), "having been asked by some one whether, his wife being dead, he might marry her sister, shuddered not at the question, but meekly endured to hear of it, and, in a truly noble way, defended and abetted this impure desire." Who this Diodorus was, we know absolutely nothing; in St. Basil's letter, from whom alone we know his name, there is no intimation whatever as to his abode or person; he had some influence, but on what grounds does not appear. This only appears, that he was one who, St. Basil thinks, ought to have been ashamed of the answer he had given; and St. Basil prays that the sin which he had countenanced might abide where it had begun. "I pray," he concludes his epistle, "that either our exhortation may prove stronger than passion, or that this incest may not spread into our diocese, but may be confined to the place where it was ventured upon." The only argument which St. Basil notices is that which Diodorus drew from Lev. xviii. 18, and which he, with much force, refutes.

A Greek writer, Balsamon, about eight centuries later, identifies this Diodorus with the celebrated Diodorus, Bishop of Tarsus, to whom St. Basil had, about this time,

written in a very different tone[r], and who was then a presbyter of Antioch. On this, it is asserted that St. Basil's letter "appears to show that Diodorus *advanced the customs of his own diocese in favour of marrying two sisters in succession*," and "*establishes the fact* that it was not the general law in the Christian Church at the time," and, more broadly still, "it *indicates* that the Church was only opposed to such marriages in those places where the civil law was perfectly established, or where the traditions of the Jewish Church retained their influence[s]."

There is no proof that this Diodorus had then any diocese; there is no hint of any contrary "customs" whatever; the only argument which St. Basil notices is that from Lev. xviii. 18; there is no trace that Diodorus "advanced any customs in proof;" the case is spoken of as a new case, wherein one unknown person justified himself against St. Basil on the plea of the opinion of this Diodorus; St. Basil treats it as the opinion of some cunning person, feigning the name of Diodorus, which he could not have done, had it been the received custom of a neighbouring diocese; he hopes that the incest may, at the worst, stop in the place where it had been "ventured upon;" sins *do* spread, especially under the countenance of one of any name and influence, and St. Basil hopes that this may not spread further. Such is the foundation, or no foundation, upon which rests all this history of the customs of the diocese of Tarsus, "a[t] metropolitical city, the jurisdiction of whose bishop extended over the province of Cilicia," "a diocese where, *probably*, the civil law had less establishment than in Cæsarea," the "absence of any general law in the Christian Church," and

[r] Ep. 135. He was made Bishop of Tarsus three years, probably, after the date of this epistle, A. 378.

[s] Evidence of the Rev. R. C. Jenkins, No. 1015, 1017, 1052, *g*.

[t] *Ib.* 1018, 1016, 1052, *f*.

"that the Church was only opposed to such marriages as far as it was influenced by the state or the traditions of the Jewish Church." The foundation, or no foundation, of all this is an opinion given by one Diodorus, to one unknown, as to the legality of an incest, which this Diodorus defended from Lev. xviii. 18, and for whom St. Basil prayed he might be brought to a better mind, or that, at the worst, the infection might not spread beyond the spot where this "daring deed had been committed" (ἐτολμήθη).

As for "the traditions of the Jewish Church," they must anyhow, it seems, be adverse to Christianity. For the witnesses who suppose that the Rabbins held the marriage with the sister-in-law to be allowed to *them*, hold them to be right, and so the Church to be wrong for opposing them; and this witness, who holds that "the traditional law of the Jews did exclude the marriage of two sisters in succession," holds the Church to have been wrong in following them. Anyhow the Church was to be in the wrong. So, if the Rabbins were against her, they knew Hebrew better than the Church, and their traditions were right, and so she was in the wrong; and if they were with her, they corrupted their traditions, and so she was in the wrong too.

But, in all earnest, is this a careful, responsible search after truth, or is it the way of men grasping at any argument which may seem to uphold a cause on which their minds are bent?

7. There is yet another witness[u] whose evidence it is necessary to notice, as likely to perplex English readers, not because he is not acquainted with the subject, but because he can only bring himself to speak of it as it is in his own mind. It is still on the subject of dispensations. The evidence may become more clear, if we

[u] Bp. Wiseman.

attend for a little to the simple principle upon which dispensations went.

The principle of these permissions was this: the author of a law has power to relax his own law; the State, the law of the State; the Church, the law of the Church; God Alone, the law of God.

First, as to the State. When the Emperors became Christian, as they enforced divers other rules of the Church by civil authority, so they began by civil authority to prohibit marriages forbidden by the law of God, and of His Church, but which had either become allowable, at all events in the corrupt times of the Roman state, or had been allowed among them from the first. The first of these laws was that of Constantius and Constans[v], which annexed the penalty of death to the marriage or other defilement of the niece, whether brother's or sister's daughter. The sister's daughter had been forbidden by the later laws of the Roman state, but not the brother's daughter[w]. The severity of this law was mitigated by Arcadius[x]; but the children remained illegitimate, the mother's dowry was confiscated, the father's inheritance went to his kindred, according to the law (provided they were not abetting in the incest); none of it might in any way, directly or indirectly, be given or bequeathed to the children. Even in this case, the Emperors, although

[v] See below, Evidence, No. 445. The Index of the Report says, "Constantius and Constans *allowed* marriages within degrees of affinity." Read "*prohibited.*" Then it says, "Councils [marriages of affinity] *almost* uniformly prohibited by them." *The* Councils which treated of them, all prohibited them.

[w] Ulpian, ap. Licinium Rufinum, tit. de incest. nupt. 6, says distinctly, in contrast to former times, "*Now*, it is lawful to marry in the 3rd degree, but only the brother's, not the sister's daughter." The laws (Dig. l. xxiii. tit. ii. l. 39 and 56. l. xlviii. tit. v. l. 11. §. 1 [ad leg. Jul. de adult.] and l. xxxviii. § 1) all specify "the sister's daughter" only. See Gothofred ad Cod. Theod. l. iii. tit. xii. l. 1.

[x] Cod. Theod. l. iii. tit. xii. l. 3. Arcad. et Honor. AA.

rarely, dispensed with their own law to individuals. Paternus, a person of high rank, pleads to St. Ambrose that the civil law had been relaxed in favour of some one[y]. St. Ambrose maintained against it the Divine law.

The second law (also of Constantius and Constans, A. D. 355), which forbad the marriage of the brother's widow, or the deceased wife's sister, rehearses that it was of old permitted: "Although the ancients (*i. e.* the old Romans) thought it lawful, when the marriage of the brother was dissolved, to marry the brother's wife; and also, after the woman's death or divorce, to contract marriage with her sister,—let all abstain from marriages of this sort, nor think that legitimate children can be born of this union; for it is agreed that the children are spurious."

These two laws corrected the heathen law of marriage, and brought them up to the Christian standard of marriage. The next law, one by Theodosius, is no longer extant, but is spoken of by six[z] authorities of the time, or soon after. In it the Emperor adopted the prevailing feeling of the Church, which, resting upon experience, misliked the marriage of 1st cousins, and he made them illegal. The penalty inflicted was extreme.

What else it contained is unknown. But there seems to have been a special reservation in it, allowing of applications for relaxation of the law as to 1st cousins. For his son Honorius[a], in forbidding under severe penalties that any should apply to the Emperor for relaxation of this law, without previous consent of the woman or her parents, makes a special exception in favour of 1st cousins, and that with reference to his father's law: "ex-

[y] S. Ambros. Ep. 60. ad Patern. § 9, "dicis alicui relaxatum."

[z] S. Ambrose, l. c., S. Augustine de Civ. Dei xv. 16, Libanius Orat. ὑπὲρ τῶν γεωργῶν, Arcadius Imp. (Cod. Theod. l. iii. tit. xii. l. 3), Honorius (*ib.* tit. x.), and Victor. See Gothofred ad Cod. Theod. l. iii. tit. x. p. 330—3.

[a] L. c.

cepting these, whom the law forbiddeth not to apply for the union of 1st cousins, *i. e.* of the 4th degree, which were permitted by the example of our father, of triumphant memory."

If the law attributed to Arcadius in the Justinian Codex be his[b] (and I know not that there is any evidence to accuse Tribonian of forgery), he repealed this prohibition of his father in the East, eleven or twelve[c] years after its enactment, A.D. 396. Otherwise it continued until the Justinian Codex, A.D. 529, when it was abolished[d]. In the West, it, at all events, remained; and there is still extant a form of law, under which the

[b] The first Novella of the Theodosian Codex brands as spurious (falsitatis nota damnandis) all Imperial laws from the time of Constantine not included in that Codex; and on this ground Sirmondi (*de lege* celebrandis, &c. Opp. t. iv. p. 388 sqq.) judges this to be so. On the other hand, it might have been omitted by those who drew up that Code, as seemingly contradicting the two others in that Code by Arcadius and Honorius. Yet it does not really contradict them, if we suppose with Gothofred (ad Cod. Theod. l. iii. tit. xiii. l. 3) that Arcadius and Honorius first mitigated their father's law (Cod. Theod. l. iii. tit. xii. l. 3), and that subsequently, although their joint names were prefixed to both, Arcadius repealed it for the East (in the lex 19, Cod. Just. de nuptiis), Honorius did not, but virtually confirmed it in the law (Cod. Theod. tit. x.) which allowed of applications for dispensation.

[c] Gothofred (l. c.) shows that it was probably enacted about A.D. 384, or 385.

[d] The contest whether the *non* is to be inserted or no in the Institt. l. i. t. 10, de nuptiis, is well known. The Latin copies have, Duorum autem fratrum vel sororum liberi vel fratris vel sororis conjungi possunt. The Greek insert the negative. Yet it seems more probable that the "not" should have been inserted by transcribers accustomed to the ecclesiastical law; and, as it stands, it agrees with the lex 19, Cod. Just., which allows it. Sirmondi (l. c.) argues against it from the place which the clause occupies; but it comes naturally as an exception to the preceding rule, that whereas a man might not marry his brother or sister's daughter, or grand-daughter, the children of two brothers or sisters, or of brother or sister, might marry. The insertion of the *non* would make the Institt. contradict the Code.

Gothic kings allowed the marriage of 1st cousins to be legitimate, and their children to inherit. But the form is very remarkable for the distinction which it makes between Divine and human law. It allows of the marriage of 1st cousins, if there be no nearer relation; and this could only be by affinity; for, except by marriage, 1st cousins could stand in no other relation to each other. It relaxes what man had enacted beyond the Divine law; it owns that law as the origin of all law, and virtually indispensable, since it cannot dispense with it. "The[e] institution of Divine laws furnished the beginning of human law, inasmuch as it is read to be enjoined in those heads which are brought under the two tables. For the holy Moses, formed by Divine teaching, among other things prescribed to the people of Israel that they should keep from intermarriage with those near in blood, lest they should both pollute themselves by returning to what was near of kin, and should not spread abroad (as is best) into other families. Wise men, following this example, have transmitted to posterity still further this chaste observance; reserving to the Prince this great benefit, in joining cousins in the nuptial union; understanding that what they had required to be asked of the Prince would be more rarely ventured upon. We praise this discovery, whereby it was so attempered, that this was referred to the judgment of the Prince, that he who controlled the morals of the people, might himself relax the reins moderately to desire. So that we, moved by the tenour of your supplications, if she is *only joined to thee by the nearness of blood of a* 1*st cousin*, decree that she may be united to thee in marriage, and forbid any further question to be raised; inasmuch as the laws agree that it is left in our will, and have confirmed your wishes by the benefit of these presents. So then, God willing, ye will have heirs to succeed you, a pure marriage," &c.

[e] Cassiodorus Variar. l. vii. form. 46.

The law[f] by which the civil prohibition of the marriage of 1st cousins was revoked, mentions as a ground "the extinction of the fuel of informations." The civil penalties were abused by the avarice of informers; and, to meet this evil, edicts were issued, forbidding all prosecutions for *past* marriages contrary to the civil law. This was given to a whole people, as to the Jews at Tyre, and the inhabitants of Syndys[g]; those of Mesopotamia[h] and Osrhoene, who were reported to be infected by the manners of the neighbouring nations, *i. e.* the Persians[i] and the Saracens. Yet these same laws enforced the prohibitions most rigidly for the future; so that they were a pardon for a past offence, not a licence to commit it.

In a rescript, the children of one who, in ignorance of the law, had married her uncle, not of her own will, the children of a marriage entered upon 40 years before, and probably now dissolved by death[k], were made legitimate. The marriage, on whatever ground, was not.

It ought, also, to be borne in mind that the civil law, extending through the whole Roman empire, involved Jews (of which an instance just occurred) in a law which went beyond the Divine law, and to the heathen it forbad marriages, prohibited indeed by our better nature, but not by their hereditary customs. To them the law was the fruit of a faith which they rejected. It was to be expected, then, that they would often be broken.

Applications continued to be made to the Emperors to remit the penalties beforehand; since a law[l] of the Emperor Zeno (about A.D. 480), while strongly renewing the

[f] Cod. Just. v. tit. iv. l. 19.
[g] Novell. Justinian. 139.
[h] *Ib.* Nov. 154.
[i] Nov. 3. Justini.
[k] The Rescript (in Dig. xxiii. tit. ii. l. 57) is addressed to the mother; whereas it would have been addressed, I suppose, to the father, if alive. The marriage, in any case, must have been dissolved according to the law (Cod. Just. l. v. lib. iv. de incest. nupt. l. 4, fin.).
[l] Cod. Just. l. v. tit. viii. l. 2.

prohibition of the "atrocious offence" of marriage with the niece, forbids also any to pray the Emperor "as to any such union, or rather contagion, and declares any permission (if it *should* be fraudulently obtained) invalid."

The dispensations of the civil power were of the penalties which itself had imposed; and so, since it had annexed penalties to incests understood to be forbidden by the law of God, there were individual cases (whether of heathen, or Jew, or Christian, we know not) in which, amid the corruption of manners, persons having access to the Emperor obtained from him relaxation of the civil penalty in marriages forbidden by the law of God. This appears from the law of Zeno, and even from that of Honorius. Yet these appear to have been the exception. The more frequent were of those which were not contained in the Divine law. They related chiefly to 1st cousins. These are specially excepted in the law of Honorius on this subject. The Gothic formula relates solely to these; an epistle [m] of Symmachus, Prefect of Rome, promising his help in such a case to a heathen friend, mentions that "manifest instances attest that this [marriage with a 1st cousin] had been allowed to many."

2. Amid these notices of relaxation by the civil power, it is very remarkable that there is (I believe) not one trace of individual dispensation by the Church, even in the remoter degrees, until the time of William the Conqueror [n]. The Church did not (as far as we know) directly by herself, extend the prohibition of marriage beyond the Levitical degree, until 130 years after the law of Theodosius [o]. Certainly she did not prohibit it

[m] Ep. 14, in Auctuar. Jureti, p. 304, ed. Par. 1604.

[n] See below, Evidence, No. 463.

[o] If Gothofred's conjecture is right, that the law was passed in A.D. 384 or 385, this was before Theodosius' personal intercourse with St. Ambrose. And certainly there is no apparent ground why St. Ambrose, had he wished it, should not have obtained such a decree from Gratian, who listened to him.

until after the time of St. Augustine; and the first mention of its prohibition in the West was in the beginning of the 6th century, and in the middle of the 7th in the East, although at this last date as an existing custom [p]. This, in the West, was about the time when at latest the civil prohibition was withdrawn. The Church established the prohibition the more decisively, when other hindrance of the marriage was withdrawn.

And thus began Ecclesiastical laws of marriage, as distinct from Divine. They were prohibitions of certain marriages which were left free by the Divine law, but which (as in the case of 1st cousins), from the nearness to those prohibited, and also from seeming experience that they had not one of the blessings of marriage, and did not further the end of a healthful offspring, the Church then forbad. The Church had the power of suspending these her laws; but to suspend them in favour of an individual seems somewhat arbitrary, and so in those times she did it not. The case of a newly-converted nation is different. The Church may, of course, suspend her own laws; canons are not unchangeable in their own nature, like articles of faith, unless they relate to that, which, being founded on God's word, cannot be changed. It was in conformity, probably, with the actual law in the yet remaining British Church, that our Saxon forefathers were left free to marry in any degree beyond the 1st cousin. In no case was there any dispensation as to any degree prohibited in Leviticus. The existing marriages of converts from heathenism were not dissolved beyond the Levitical degrees; within them, it was held they could not stand.

Individual dispensations (it is agreed on all hands [q]) did

[p] Evidence below, No. 460.

[q] "After the 11th century the use of dispensations [generally, not as to marriage only] began to be more frequent, the state of the Church admitting it, in that it was shaken exceedingly by various

not begin until the close of the 11th century, and then they were given only in the degrees purely ecclesiastical, and that to crowned heads; and to them only on very grave and urgent grounds, such as to the restoration of public love and peace. They were, then, also frequently refused.

Within the Levitical degrees there is no instance whatever of any dispensation until Alexander VI., at the close of the 15th century. And this was not accidental. It was the deliberate mind of the Western Church, her Councils, her Popes, her Schoolmen, her Canonists, that these marriages were a part of the unchangeable Divine law; and Popes, Schoolmen, and Canonists deliberately taught that the Popes could not dispense within those degrees. Pope Zachary[r] (A. 745) held it a thing incredible that a Pope should dispense contrary to the Canons

tumults of wars, and by new decrees. Yet this survived from the ancient discipline, that no indulgence was given, unless it were compensated by the public good" (De Marca de Conc. Sac. et Imp. iii. 14, 6). "It is supposed that the first dispensation of kindred was given by Pope Paschal II. to Philip I., King of France, who had espoused Bertrade, and could not resolve to leave her, after so many anathemas and interdicts thundered against his person and his dominions. At last the Pope promised a dispensation, provided he would first separate from her, and moreover he promised to separate from her until the dispensation was granted. But after Paschal II. had set the example of a dispensation of this kind with regard to kindred, the same dispensations soon became common" (Thomassin, Discipline de l'Eglise, p. iv. l. ii. c. 70). "Before the 11th century we see no dispensations given by the Popes on the ground of relationship. Up to that time they did not even believe that they had power to dispense with the rigour of the Canons. The disorders of the 9th and 10th centuries, the troubles and wars, the ignorance of the clergy, the invention of the false decretals, changed the ancient discipline" (Code Matrimonial, t. i. p. 398). See Christian. Lupus, quoted below, p. 23, not.

[r] "God forbid that our predecessor should be believed to have enjoined this [the marriage with an uncle's widow]. For what is found to be contrary to the rules of the Fathers or the Canons, is not directed by this Apostolic see" (Zach. ad Bonifac. c. 5).

of the fathers; Pope Innocent III. (A. 1198) and Pope Eugenius (A. 1431—1447) held and answered that the Pope *could* not dispense in those degrees [s]. The extreme doctrine as to their power to dispense was rejected as vanity and flattery [t]. The Canon law, in which the words of Pope Innocent were incorporated, bears witness against the modern claims.

The latest stage has been since, in evil times, two bad Popes, contrary to the previous voice of the Church, and still amid protests from those who knew well the grounds of the ancient law, took upon themselves the plenitude of power to dispense with what still was held Divine law; and a King of hateful memory effaced the scandal of their act by his own greater scandal of pleading God's law falsely [u] in defence of his passions. The Council of Trent endeavoured to restore the neglected Canons; but, having itself virtually given up the ancient principle, its regulations in countries not exclusively Roman Catholic have become a dead letter.

There are, then, very distinct stages with regard to the prohibition of marriages between those near of kin, by blood or by affinity, in the Christian Church.

1. Until about the beginning of the 6th century, when all marriages forbidden in Holy Scripture, whether expressly or by implication, and these only, were absolutely forbidden by the Church, and held to be incest. With this the Church of England coincides.

2. Until the end of the 11th, during which other marriages were prohibited by ecclesiastical law; but in cases of newly-converted individuals or nations, this ecclesiastical law was not enforced.

3. Until the end of the 15th, during which the Eastern

[s] See Evidence, No. 463, p. 25, and No. 464, p. 27.

[t] See No. 471, p. 33. 474.

[u] For since the marriage with Arthur was not consummated, there was no real affinity. See below, in Mr. Badeley's speech, pp. 110, 111.

Church retained its rule unchanged, in the West the degrees prohibited were limited in the Fourth Lateran Council, and individual dispensations within the degrees strictly ecclesiastical were allowed; those forbidden in Holy Scripture were held to be Divine and indispensable.

4. From the unhappy act of Alexander VI., when a Pope first dispensed with degrees forbidden by the Divine law; and the Council of Trent anathematized such as "denied that the Church could dispense in some of them."

In this period the Greek Church has remained as before; the English has returned to the primitive rule, the rule of Holy Scripture; the Roman Church has made the whole question one of ecclesiastical discipline, and allows, with different degrees of reserve, in affinity, the marriage of the deceased wife's sister, the brother's widow, the wife's grand-daughter [v]; in blood, the niece and the aunt [w].

The Council of Trent has anathematized those who "deny that the Church can dispense in some of the Levitical degrees;" it leaves it undecided whether those degrees are part of the law of God or no. It is open, therefore, to individuals in the Roman Church, if they hold that the Pope cannot dispense with the Divine law, to affirm its prohibitions of what used to be accounted incest to be "matters of ecclesiastical legislation;" or if they hold that he can, then they may still hold that these are part of the Divine law.

Bp. Wiseman, with most modern Roman writers, takes the former alternative; but so he is brought into conflict with the Ante-Tridentine authorities, whose

[v] An instance is given in the Code Matrim. i. p. 431.

[w] "Chardon, in his Histoire des Sacremens, t. 6, du Mariage, c. 16, says that he believes that the Constable de Lesdiguières (about A. 1590) was the first who obtained a dispensation to marry his daughter to his grandson, *i. e.* the aunt to her nephew" (Code Matrimonial, i. p. 411).

weight he in the abstract acknowledges, and seems (as is natural) unwilling to contemplate a condition of the Church not different only, but at variance with that in which he lives. So, when Bp. Wiseman is asked, "Can you at all say, historically speaking, from what period it was in the Church that these marriages began to be the subject of dispensation?" he answers, "I do not think we can take the question exactly partially, that is, with regard to any one degree; but taking the whole history of the exercise of the dispensing power, I should have no hesitation in saying that it was very early [x]."

Canonists before Bp. Wiseman have taken it separately as to this one degree, about which the Commissioners inquired. They have answered the question distinctly. Pope Martin V. did make a marriage, already long contracted, legal, in which a man had married the sister of one with whom he had previously sinned. There had been sin, but it was not the sin of incest, any more than fornication is the sin of polygamy. The first real dispensation as to this degree was that by Alexander VI. Canonists have pointed out the very year "in which these marriages began to be the subject of dispensation," which the Commissioners inquired. The plain answer would have been, "A. D. 1500 [y], in which Alexander VI. gave the dispensation to Emmanuel, King of Portugal."

[x] Evidence, No. 1168.

[y] L'Art de vérifier les Dates. He was surnamed "the Fortunate," on account of the great accessions to his empire in India in his reign. He promoted the propagation of the Gospel in his conquests; sought from Alexander VI., together with Ferdinand the Catholic, a reformation of the clergy in Spain and Portugal, and obtained nothing. He asked for a new dispensation in what was hitherto the law of God, and obtained it. Emmanuel "the Fortunate" had by this marriage ten children; but in the next generation his family was extinct (*Ibid.*). The other monarch to whom Alexander VI. gave a dispensation to marry within the Divine degrees (his aunt) also "died childless." See below, No. 464, p. 27, note.

Bp. Wiseman proceeds: "But the difficulty is this, that the first notice, both of impediments and of dispensations, in any very clear and definite form, is to be found in the Imperial law: and therefore it would appear as though the State took the lead, rather than the Church, in the matter; but at the same time we find evidences that the Church acted upon its own particular regulations, that it did not always legislate in exact accordance with the laws of the empire, and that it superseded those laws in particular instances." Bp. Wiseman joins together "impediments and dispensations." It is best to take them separately. First, as to impediments.

The Church had no need to lay down the impediments to such incests as are forbidden in Leviticus, because this was her own code, in which they were already laid down for her. There is no such list, then, in the Church, out of the Bible, as is contained in the Bible, or (in its degree) in the Roman law. Again, sins were not forbidden until there was occasion for enactments, in the same way as she did not enlarge her written creed until heresies arose. And even when she was called upon to set a penalty upon these extreme incests, the Councils expressly avoid naming those, as it were, monsters. But Bp. Wiseman does not surely mean that it is not quite as clear what the Church forbad, as what the State forbad; or that the Councils of Eliberis and Neo-Cæsarea, which also *he* does not deny to be the fruit of the Church's system, are not as distinct, in the cases which they prohibited, as those of Constantius. The State did "take the lead," but it was in a prohibition about which in England there is now no question, nor in the law of God. The State "took the lead" also in dispensations, but it dispensed only in what it had itself enacted.

Bp. Wiseman proceeds: "For example, in one of the earliest passages upon the subject of marriage, St. Basil speaks of the laws respecting prohibitions as handed

down by tradition, treating them as something ecclesiastical." St. Basil speaks of it as something far more than "ecclesiastical;" he speaks of it as something contrary to the law of nature and of God.

Bp. Wiseman continues: "I think one of the earliest definite cases of the Church setting aside the Imperial laws, and acting according to its discretion, is in the letter of St. Gregory the Great to St. Austin, with respect to English marriages, in which he says that the Imperial laws prohibit marriages as far as the 6th degree, but that in this case he thinks that the English should be permitted to marry as far as the 3rd and 4th. That was of course, so far, showing that the Church acted upon its own authority with respect to the impediments to marriage." The relation of St. Gregory's rule to that then adopted by the State, is just the reverse of what Bp. Wiseman states. St. Gregory, instead of allowing marriages which the State prohibits, prohibits marriages which the State allowed. The "Imperial laws" never prohibited marriages to the 6th[z] degree; they now permitted all but what the law of God forbad. St. Gregory begins by stating, "A certain earthly law in the Roman state allows" the marriage of 1st cousins. The law which St. Gregory did relax was the law which the Church itself had made; he did not wish it to be applied to our newly-converted ancestors. But he adds, "To be united with a mother-in-law is grave guilt, because it is written in the law, Thou shalt not discover thy father's nakedness. To be united to a sister-in-law is also forbidden, who through her former union was made the brother's flesh." St. Gregory the Great, then, owned, too, what he could not

[z] A little later, the Lombard laws, under Rotharis, A. 638-653, forbad *thenceforth* (*a modo*) the marriage of 2nd cousins, but expressly following the Canons. See Leg. Longobard. l. ii. tit. iv. l. 3, 4. But of this there is no question here.

relax, and why he could not relax it, "because it is written in the law" of God.

Bp. Wiseman concludes what he has to say on this subject: "The matter has probably been brought before the Commission with reference to the provisions of the Justinian Code upon the subject; from which, at the same time, it is clear that a dispensing power was used." In a degree certainly it was, in that the Emperor remitted occasionally the penalties of the civil law, chiefly in degrees not prohibited by the law of God; penalties, one must say, in part, of extreme severity.

Such is the sum of Bp. Wiseman's answer as to the Church's dispensations. An imperfect account of one act of St. Gregory the Great is all which he tells of the whole history of dispensations in the Christian Church.

To what is this semblance of saying something, and really saying nothing, which bears upon the Commissioners' question, to be attributed, but an unwillingness either formally to set aside the teaching of the whole Church or to acquiesce in it?

Those who advocate these marriages seem glad to catch at the present laxity of the Roman practice, however, on all other occasions, they will even rail at its "corruptions." In a matter which does relate to the sacredness of marriage, which St. Basil the Great shrunk from as incest, which frequent councils, fathers, and popes, and thoughtful religious writers pronounced incestuous, which a pope repudiated with a "God forbid," and others limited their own power with a "*cannot*," although the modern practice sprung up in evil times and with evil men, here and here alone, according to these parties, the practice of the Roman Church is Scriptural and good!

But even this argument will not help them. For the practice of the Roman Church may be more consistently explained on a hypothesis which they must altogether

reject, the doctrine that what the pope does in the Name of God, he does by the authority of God. The Council of Trent expresses no opinion; it does not say that the Levitical degrees are not the law of God, nor, in themselves, binding still; it anathematizes those who deny the Church's power to dispense with some of them, but it admits any solution equally which admits this.

For myself, I came to the conclusion that this is the truer view of the origin of these dispensations. The older writers say that the popes were led to this by those who magnified their power [a]; there was no question (except among an unpopular body of schoolmen [b]) that the Levitical laws were Divine law; it is spoken of as a probable ground why a marriage should not be dispensable, that a pope has never dispensed with it [c], and as a ground why it is certainly dispensable, that a pope has dispensed with it. I will add here two passages, at hand at this moment, illustrating this argument, from the authority of the pope.

"Corradus [d] maintains that the pope can dispense, and has often dispensed, in order that parties may proceed to another marriage, notwithstanding a former celebrated in the face of the Church, but not consummated. He assigns as one of the reasons of this dispensation, "When the married parties are very displeasing to one another, and there is fear of great future scandal. For that authority, 'What God hath joined let not man put asunder,' is not to be understood rudely or superficially; since not man, but GOD SEPARATES whom the Vicar himself of Christ separates, to whom He hath given a

[a] See below, Evidence No. 474, p. 35.

[b] The Scotists, Evidence, No. 469, p. 29.

[c] Below, No. 488, pp. 49, 50.

[d] Code Matrimonial, T. i. p. 405, quoting Corradus' words from his Praxis dispensationum Apostolicarum, l. viii. c. 7. *n.* 26. The work was printed at Cologne, 1678 and 1716, and Venice, 1735.

most wide power as to articles of faith." The passage is the application of a principle enunciated in the Decretals, with regard to the union of a bishop with his see, yet with reference to the text, Matt. xix. 5: "For[e] not man, but God, separates whom the Roman Pontiff, who on earth acts not as a mere man, but in the place of the Living God, weighing the needs and benefit of the Church, dissolveth, not by a human, but rather by a Divine authority."

Until the Church of Rome has decided which of these two grounds she takes, in permitting marriages forbidden by the Levitical law, whatever individuals say is but their private opinion, and they themselves would own that it is as nothing compared to the weight of authority which the Roman Church too recognizes against them.

8. Another witness, however, would shew that all degrees of affinity have, in the Roman Church, since the Council of Lateran, been held to be merely ecclesiastical. He says: "In 1215, the Fourth Lateran Council, under Innocent III., sat, in which the old artificial degrees of affinity were removed, and the one single case of affinity in the 1st degree was retained as a prohibition; but as it was dispensed with, of course it must have been held at that time still to have been ecclesiastical[f]." This is inaccurate, as relates to the present question. The Fourth Lateran Council abrogated altogether two *kinds* of affinity[g] (as this witness describes); it restrained altogether the prohibited *degrees*, *both* of consanguinity and affinity, limiting the prohi-

[e] Decret. Greg. IX. l. i. t. vii. c. 3, de Transl. Episc.

[f] Evidence of Rev. R. C. Jenkins, No. 1031. The word "*still*" again just reverses the facts; the nearer degrees of affinity were *never* regarded as merely ecclesiastical, until after the Council of Trent; "the 1st degree," too, in one way, includes the mother-in-law, as, collaterally, the sister-in-law.

[g] In secundo et tertio affinitatis genere, Conc. Lat. IV. Can. 50. These were affinities arising out of the primary affinity. If a brother-

bition to the 4th, *i. e.* the 3rd cousin; but within this limit, all intermarriage continued to be forbidden alike, whether by blood *or by affinity*. "Let not," it says expressly [h], "the prohibition of conjugal union go below the 4th degree of consanguinity *and affinity*, since now such prohibition cannot be generally observed without grave detriment."

The kind of affinity to which the prohibitions continued to apply comprises all which *we* now understand under the term; the relation, by which one married is connected with those related by blood to the husband or wife. It was dispensed with, as we have seen, about three centuries after the Lateran Council, in a very grave case, yet by the same pope who gave to another a dispensation to marry his aunt [i]. Unless, then, marriage with an aunt is thereby proved to be a matter purely "ecclesiastical," neither is that with the sister of the deceased wife.

This first mistake affects the subsequent statement: "In 1563 the Council of Trent issued its marriage chapters and canons; and in those, all dispensations in the 2nd degree of consanguinity, except among princes and for public utility, were prohibited. Of course that did not refer to degrees of affinity. It left the question of affinity as it was at the time of the Council of Lateran."

The Council of Trent, in its third canon, expressly mentions together degrees of "consanguinity and affinity." "If any one say that those degrees only of consanguinity or affinity which are expressed by Leviticus can hinder from contracting a marriage, or sever it when contracted, and that the Church cannot dispense in some of them, nor ordain that men should hinder or scorn it, let him be anathema!" Whatever it consti-

in-law married again, his wife stood to A in affinity of the second *kind*; if she survived and married again, her husband was connected with A by the third *kind* of affinity. See Sanchez de Matr. l. vii. Disp. 67.

[h] L. c. [i] See Evidence below, No. 464, p. 27, note *o*.

tutes as to the one for those under obedience to the see of Rome, it constitutes for the other. The decrees of reformation limited spiritual affinity, and that held to be contracted by carnal sin and the hindrance from "public propriety;" those of consanguinity *and affinity* it left as before. It is notorious that what it says, it says of both alike. "In contracting marriage, let either no dispensation at all be given or but seldom, and that with adequate ground and gratuitously. In the 2nd degree let no dispensation be ever given, except between great princes and for some public cause."

This is so self-evident from the Council of Trent itself, from actual practice, from every writer who ever wrote on the subject, that one can hardly help thinking that some misunderstanding occasioned this question and answer to stand as they do.

If, however, it be proved, ever so clearly, that the Ancient Church did disapprove of these marriages, as contrary to Holy Scripture, so did the Greek Church, it is said, of second marriages altogether, and *à fortiori* only of these. In other words, the Greek or Oriental Church is now, besides ourselves, the great witness against these marriages. Therefore its authority must be disparaged, and its prohibition traced to some principles inconsistent with our English habits. It is clear that the early Church had no other marriage-law than ours; a separate subject, the supposed opinion of the Greek Church as to second marriages, is brought in, to lessen the weight of their authority. It is worth while to remove any prejudice which may embarrass honest minds, so something may be said on this also.

The very statement involves a confusion between the ancient and modern, the practice of a portion of the Church and the mind of the whole, the private opinion of particular fathers and the consent of all.

The question relates to the present. "You[j] are probably aware that the Greek Church *is* more stringent upon this question than the Western?" The answer is: "I am aware that it *is* strict upon this question, and also upon second marriages generally. It evinces its feeling so strongly against second marriages, that it would, of course, be peculiarly strong against these." But the note points this against the ancient Greek Church, referring to three of its provincial councils in the fourth century. But this is wholly irrelevant to this question. For the *ancient* Greek Church was not in the least "more stringent than the Western," and so any particular feeling about second marriages expressed in certain Asiatic councils, does not, in the least, account for one universal condemnation of these incests both in East *and West.* But to go a little further into the subject. It needs only to look into such a common book as Bingham, to see that "to condemn second marriages was heretical." Both Montanists and Novatians made it a charge against the Church, that she allowed second marriages, and that so freely. The Council of Nice required them to renounce their condemnation of second marriages, and to communicate with those twice-married, as a condition of being reunited to the Church. One of the earliest Christian writings, which was often read publicly in churches, asks this question[k]: "If the husband or wife of any have died and the other marry, doth he sin?—Whoso marrieth, sinneth not; but if he remain alone, he obtaineth for himself great honour with the Lord." In which he seems to have in mind the words of St. Paul: "If[l] her husband be dead, she is at liberty to be married to whom she will; only in the Lord. But she is happier if she so

[j] Evidence of Rev. R. C. Jenkins, No. 1019.

[k] Hermas, l. ii.; Mand. iv. sec. 4. [l] 1 Cor. vii. 39, 40.

abide after my judgment." Tertullian, when fallen into Montanism, reviled this book, on that very ground [m]. When in the Church, he had, following the Apostle, counselled his own wife [n], if she should survive him, to remain unmarried, but, at all events, to marry in the Lord, *i. e.* a Christian. When he had forsaken the Church, he reproaches the Church (whom on this very ground, in part, he calls "the carnal") with their second marriages. "Heretics [o] take away marriage; the carnal multiply it. The one marry not even once; the other more than once." In the Western Church, her great doctor, who has more than any other formed her mind, speaks thus decidedly: "These [p] are wont to move a question concerning a third or fourth marriage, and even more numerous marriages than this. On which, to make answer strictly, I dare neither to condemn any marriage, nor to take from these any shame of their great number. I dare not to be more wise than it behoveth to be wise. For who am I, that I should think that that must be defined which I see that the Apostle hath not defined? For he saith, 'A woman is bound, so long as her husband liveth.' He said not, her first, or second, or third, or fourth; but, 'A woman,' saith he, 'is bound, so long as her husband liveth; but if her husband shall be dead, she is set free; let her be married to whom she will, only in the Lord; but she shall be more blessed, if she shall have so continued.' I know not what can be added to, or taken from, this sentence, so far as relates to this matter. Next, I hear Himself also, the Master and Lord of the apostles and of us, answering the Sadducees, when they had proposed to Him a woman, not once married, or twice married, but, if it can be

[m] De pudicit. c. 10. [n] Ad Uxor. l. ii.

[o] De Monogam. c. 1.

[p] De Bono Viduit. c. 12. See St. Augustine's short Treatises, p. 365. Oxf. Tr.

said, seven-married, whose wife she should be in the resurrection? For rebuking them, He saith, 'Ye do err, not knowing the Scriptures, nor the power of God. For in the Resurrection they shall neither marry, nor be given in marriage, but shall be as the angels of God in heaven.' Therefore He made mention of their resurrection who shall rise again unto life, not who shall rise again unto punishment. Therefore He might have said, 'Ye do err, knowing not the Scriptures, nor the power of God; for in that resurrection it will not be possible that there be those that were wives of many,' and then added, that 'neither doth any there marry.' But neither, as we see, did He in this sentence show any sign of condemning her who was the wife of so many husbands. Wherefore neither dare I, contrary to the feeling of natural shame, say, that when her husbands are dead, a woman marry as often as she will; nor dare I, out of my own heart, beside the authority of Holy Scripture, condemn any number of marriages whatever. But what I say to a widow who hath had one husband, this I say to every widow; you will be more blessed, if you shall have so continued."

Even the words of the Apostle, "the husband of one wife," came but gradually to be understood in Asia Minor[q] of ordinary re-marriage, not of polygamy, or of marriage after lawful divorce of an offending party; yet St. Jerome[r] says that "the whole world was full of ordinations of twice-married priests;" "of Bishops," he says, "if I would name them severally, they would exceed that of the Synod of Ariminum" (300). Theodoret[s] mentions by name such Bishops "of blessed and holy memory" at Antioch, Beræa, and Jerusalem, and that, "at the recom-

[q] See more at length Note N. on Tertullian, ad Uxor. i. pp. 419-20, Oxf. Tr.

[r] Ep. 69, ad Ocean. sec. 23.

[s] Ep. 110, ad Domnum. See *Ibid.*

mendation of the Bishops of Phœnicia, with the approbation of the Bishop of Constantinople, the Bishop of Pontus, and all those of Palestine." These being the Bishops of the very portion of the Church where the rules in question were in being, it is impossible that any objection to these marriages can have had such influence as this objection supposes. When even eminent Bishops might be "twice married," it is impossible that an abstract depreciation of second marriages can have been *the* ground why these incests were accounted detestable. The cases are wholly different. Those incestuous marriages could never knowingly be celebrated by the Church; second marriages were: the incests were condemned, as such, by the Church; the Church condemned as heresy the condemnation of second marriages: the incestuous persons must be separated before they could be restored to the Church; to separate second marriage would have been always accounted sin: to the incests, after separation, a long course of penance was assigned; to the second marriages there was a brief period of discipline only, not of penance[t]: against the incests the Church urged the law of God, by which she herself was bound; in putting a temporary restraint upon those who entered on a second marriage the Churches in Asia Minor acted upon their own judgment: the penalty on incests was an hereditary rule of the universal Church contemporary with the Gospel itself; the discipline appointed for the twice-married was ruled in later times in one portion of the Church. Only a few years after the date of the Councils alleged, the first Œcumenical Council[u] made it a condition of receiving back the Novatians, that they should "communicate with those married a second time."

[t] No one who had been placed among penitents could be subsequently ordained, whereas there were eminent twice-married bishops.

[u] Conc. Nic. Can. 8.

The rule of the Churches of Asia Minor does seem (within these bounds) to have been very strict; for it does seem to us strict that any privation should have been annexed to a second marriage [w]. Yet it was a matter of discipline only [x], intended to press on those persons who entered on this state for the second time the caution contained in the Preface to our own Marriage Service. It is, anyhow, a partial regulation not received by the Church.

I did not think it necessary, in dwelling upon the prohibition of Holy Scripture in Lev. xviii., to notice the paradox of Sir W. Jones [y], that the phrase used in Lev. xviii., "uncover their nakedness," does not allude to marriage

[w] Justellus (ad Concil. Laodic. can. 1) and Suicer (v. διγαμία) endeavour to make out that the second marriage, which is the subject of these Canons, was second marriage after unlawful divorce; but the language of the Canons does not admit of this (see Bevereg. Synod. in Can. Conc. Laod. t. ii. p. 194).

[x] It does not appear when it was made. The Council of Ancyra (A.D. 314), can. 19, which first mentions it, alludes to it only as something existing; the Council of Neo-Cæsarea, in the same year (can. 7), forbids only that presbyters should, in such cases, be present at the marriage feast, since they had discipline to go through; the Council of Laodicea says (can. 1), that, according to the canon, those who were openly and lawfully married a second time, "after a short time given to fasting and prayer, were to be received to communion." St. Basil, Epist. 188 (can. 4), says, "*They* appointed [ὥρισαν, not ὡρίσαμεν] a year for the twice-married."

[y] It is quietly assumed in a "case" printed in this report (App. p. 129). "However erroneous, in the opinion of *all* oriental scholars, may be the popular notion that the expression [uncover her nakedness] means marriage." It does not *exclusively* mean marriage, so that incest unlawful in marriage should be lawful out of it. It is not *limited* to marriage; it forbids the whole act itself, which, in lawful marriage, is hallowed by marriage. Mr. Denham says, in his pamphlet (Marriage with a Deceased Wife's Sister, p. 22): "These two chapters (Lev. xviii., xx.) do not contain a prohibition of polygamy," "nor in any part of them relate to fornication, neither" do they "contain specifications of the chief varieties of adultery." "We take,

at all. Any thing might be made of any thing, if so absolute a prohibition as "None of you shall approach to any that is near of kin to him, to uncover their nakedness," could be limited to any mere aggravated case of sin. Where might not any one find a loophole for his besetting sin, if such exceptions might be made? It is the very temper rebuked by our Lord, when the Pharisees pleaded "Corban," and made exceptions to the fifth Commandment: "Ye make the word of God of none effect through *your* traditions," inventions of their own. God says, "None of you shall approach to any that is near of kin to him, to uncover their nakedness." Man says, "Yes, you may; only let it be incest only, not adultery, not polygamy;" a mode of interpretation borrowed from that first denial of God's commandments, "Yea,

then, these two chapters to contain *regulations of polygamy*," and simply omits all mention of "incestuous marriages," which yet, as we know by history, were practised by the heathen. As if, because fornication, or adultery, or polygamy, simply, were not the object of the law, therefore (there being no other alternative) a regulation of polygamy *must* have been. Bp. Patrick (whom Mr. D. quotes in his favour) says, very clearly, "Not to uncover the nakedness of the persons here mentioned, is not to take them in marriage, and much less to have knowledge of them without marriage," on Lev. xviii. 6 (see also a valuable passage of Maimonides, quoted by him on verse 8). The like expression, Deut. xxii. 30, clearly means marriage, to which the words "a man shall not take" belong. Mr. Binney, Evidence, p. 88, *f*, thinks that this law does not relate to marriage, 1st, because the punishment of death [in some cases] seems *to him* too severe; and, 2nd, because it would forbid such marriages as Abraham contracted or David would have sanctioned. [Sarah is thought to have been Abraham's niece, and the patriarchs stand alone in the history of mankind; Tamar's words (2 Sam. xiii. 13) may have been wrung from her by fear. The case of God's dispensing with His own laws has been considered already.] Mr. B. is content, if "either the prohibition is not of marriage, or from such uncertain grounds nothing positive can be certainly inferred," as if it were a gain to be left in uncertainty as to a moral law, *except that one should avoid every thing which it may possibly mean.*

hath God said, Ye shall not eat of every tree of the garden?" "Ye shall not surely die." What! is a mother not sacred, unless it be the sin of adultery or polygamy? But if "Thou shalt not uncover thy mother's nakedness" prohibits every sort of incest with a mother, why are the general words, "None of you shall approach to any that is near of kin to him, to uncover her nakedness," not to include every sort of incest with those near of kin? Surely, they who so pare away the meaning of God's word would do well to bear in mind the solemn warning against those who "take away from the words of that book," or that other, "What thing soever I command you, observe to do; thou shalt not add to it, nor diminish from it[z]."

My own object was (as I said in the beginning) to point out the meaning of the law of God as contained in Leviticus, and to show that it had been held sacred until later and unhappy times in the Church; not passing away, not destroyed, but fulfilled in the Gospel. In doing this, I assumed the consent of the English Church, my object being to justify the English Church against those who impugned her, not to bring out the mind of the English Church herself. This has been done so fully by a valued friend, versed as few are in the ancient legal history of our Church and country, and the Canon law generally, that I am thankful to be allowed to add his speech on a late important trial. Mr. Badeley's speech, which at my request is here printed from the short-hand writer's notes, is almost a history of the state of the law, showing (in his own words) that, "As[a] far as the ecclesiastical law is concerned, there has been but one uniform rule from the earliest period of the Church, and the earliest period of

[z] Deut. xii. 32.

[a] See below, Speech of E. Badeley, Esq., p. 167.

this country, to the present, and that there is nothing either in the case or in the statute which in any respect interferes with those degrees of marriages, and those prohibitions which were left by the Statute of Henry VIII., and that from the earliest period to the present, one continued and connected series of law comes uniformly down to the present time; and it cannot be said now, that the Statute of William IV. has made any distinction or any difference in that respect. You have therefore the law brought down from the earliest period to the present time, in one unbroken chain."

In that trial, the Court ultimately gave judgment unanimously in favour of the appellants, thereby distinctly affirming the law to be as Mr. Badeley had contended, and declaring these marriages to be illegal and incestuous; and that the fact of one of the wives being the illegitimate sister of the other made no difference, the law of consanguinity and affinity applying equally between those who were illegitimate, as between those whose relationship arose from lawful wedlock.

I may, in addition [b], refer to a tract, in which are a few earnest words, which many (it is hoped) will know how to appreciate, "Against Profane Dealing with Holy Matrimony." In it, Mr. Keble adverts to presumptive evidence from the New Testament, which this writer had not noticed, the probability that these incests may have been prohibited by the word πορνεία, in the Apostolic decree, Acts xv. 20, 29, which is (as he observes) much confirmed by the use of the same remarkable word as to that deep incest in 1 Cor. v. 1, and, more than any other solution, accounts for the prohibition of that sin especially to the Gentile converts. For, certainly, one

[b] To judge from the extracts quoted by Mr. Denham, who attempts to answer them, Professor Bush's Notes (Critical and Practical on the Book of Leviticus, New York, 1843) must have much very valuable on this subject.

should not have expected here a law simply prohibiting a moral offence; whereas, since the law of incest among the heathen was not the same, in some points, as the Levitical code, the Apostolic canon thus prohibits, under the name of fornication, incest which they had not, in the times of ignorance, accounted to have any thing amiss, but which are contrary to the law of God [c].

To explain one point more. The Commissioners having asked me whether I was aware of the state of the law "in all the Protestant countries on the continent," I stated what I knew from Germans themselves, as to the effects of the permission of these marriages on society generally, and also on the general laxity as to divorce in those same states. Before the marriage-law of other states is held out to us to copy, at least, it should be made clear that they are not suffering by it. I alleged three points; 1st. That the admission of these marriages had involved that of other marriages also, which would any how shock English people. The answer set up to this is, that *these* marriages are without restriction at all, while for marriage between uncles and nieces a dispensation is needed from the civil power, in Protestant Germany. It is also stated, that marriages between uncles and nieces are "rare [d]." Rareness is a relative term. If allowed at all, the laxity and violation of God's law is admitted as a principle; it requires only circumstances to develope it. In Prussia, especially, "the most important [e]" part of Germany, that which is likely to give the tone to the rest of Germany, the marriage of uncle and niece is so common that the

[c] See Hooker E. P. iv. xi. 7, Hammond on Acts xv., and On Marriage with a Deceased Wife's Sister (lately reprinted), quoted by Mr. Keble.

[d] Evidence of A. Bach, Esq., No. 978.

[e] Ib., No. 965.

beautiful family relation is sadly broken up. Were it true, that actual instances were as yet rare, which it is not, unless by this it is meant, that the marriage with the sister-in-law is such a common every-day thing, that this marriage is rare in comparison, but, if it were rare, even this is no safeguard. Who ever measured the injury to a vessel by the amount of water which first oozed through the leak in its sides? Or who ever thought a bowing wall would not fall, because a few unmortared stones only were parting from its sides? Or who estimated the rapidity of a whole descent by that of the first few yards, except, indeed, by a startling law of accelerated velocity? The one question, in all nature, moral or physical, is "Is the course upwards or downwards, or what is there to check or to arrest it?" Let any one read the timid way in which Claudius prepared the degraded and obsequious heathen senate of Rome for his wish to marry his brother's daughter [f]. And yet this marriage, with one brief exception [g], became the rule for heathen Rome. The evil was not repaired until the Empire became Christian. Yet the sister's daughter was still spared and forbidden [h]. What we, in England, should still account an instinct of our nature is at a lower stage already in Protestant Prussia, both as to the law and the actual practice, than in heathen Rome in the worst state of its decay.

And who then shall measure the future course? Men, and still more women, become accustomed but slowly to the first stage of relaxation of a received law of marriage. They do not venture upon it without misgivings. All rebellions against remaining instinct are slow at first. But each precedent, in which those who do so rebel are,

[f] Tac. Ann. xii. 6.

[g] Nerva. See Gothofred on the Cod. Theodos. l. iii. Tit. xii. de Incest. Nupt. t. i. pp. 336-7, ed. Ritter.

[h] Ibid.

whether through easiness or mistaken kindliness, well received by society, prepares in its own neighbourhood to widen the circle. Let those who wish to forward these marriages say what they will, we are still far from that state in which those countries are where these marriages are allowed. It is admitted by the Report, that "the[i] prevailing feeling among the laity of the United Kingdom is against these marriages." In the United States, we are informed, on the authority of an eminent judge[k], they are deemed the "*best* sort of marriages;" "in a moral, religious, and Christian sense, *exceedingly praiseworthy*." In Protestant Germany we hear this union is "rather popular[l] than otherwise;" "its fitness undisputed in all classes of society;" "the feeling of the people undoubtedly in its favour." These nations did not arrive at this state all at once. Who shall guarantee that this feeble and inconsistent law, which in some places still operates as a restraint upon the marriage of uncle and niece, shall survive, and in the whole of Protestant Germany that marriage shall not become "exceedingly praiseworthy," a sort of tutelary marriage[m], in which the uncle and husband shall be a sort of natural protector to his niece and wife? Or what shall restrain us from the same course?

We are invited to copy the continental states. Which? "France[n], nearly the whole of Germany, Denmark, and

[i] Report, p. 7.

[k] The late Mr. Justice Story, quoted Report, pp. vi. vii.

[l] Evidence of A. Bach, Esq., No. 983, 970.

[m] This, in an official French document, relating to the law of 1832, is put forward as the most prominent ground of dispensation, as to the marriage of uncle and niece, "That the children should find in the uncle the protection of a father, in the *aunt* the care of a mother," precisely the grounds upon which the marriage of the sister-in-law is advocated here. See Evidence, App. No. 11. p. 136, note.

[n] Evidence below, No. 493. "Are you aware that, by the law prevailing at present in France, in nearly the whole of Germany, in Denmark, and all the Protestant states on the Continent, those marriages are now permitted?"

all the Protestant states on the continent." But these very states do not agree among themselves; and we are invited, by a sort of composition, to adopt the fullest laxity used in any of these countries on the one class of marriages, and to retain a strictness unknown to any of them as to the other. In France, I am informed, the marriage with the deceased wife's sister was under the republic first allowed indiscriminately; then "the effects were so horrid" that it was changed. It was absolutely prohibited by the Code Napoleon, and all dispensations absolutely refused, as well as in the case of uncle and niece. By the law of 1832[o] both are admitted by dispensation "for grave reasons" and "grave causes;" *in both cases the prohibition was to be the rule, the dispensation the exception;* "and care was to be taken that the prohibition was not to become a sport, the exception take the place of the rule, and the system of the law be overthrown." These "grave causes" are indeed large enough to make the prohibition a dead letter, if men will. They even encourage men to make it so. It is held out[p] that dispensations will be granted between uncle and niece, nephew and aunt, where uncle or aunt would take care of children, or an establishment would be preserved, the ruin of which would hurt important interests, or means of subsistence would be obtained for one of the parties, or when the union would tend to prevent or end a lawsuit, hinder an injurious division of property, facilitate family arrangements; these are held out as "motives of nature to gain the approbation of authorities." Motives of nature, truly; but it is the very misery that where such marriage is allowed, every act of love, every care of "mind, body, or estate," which uncle or aunt could personally show, as standing in a parent's place, can

[o] See the document in the Evidence, App. No. 11, and Note *, p. 135, 6.
[p] *Ibid.*

only be shown through what even some heathen accounted incest. Yet, whether strict or lax, the law of France is wholly different from what men wish to introduce into England. It equally prohibits or allows, as a rule or as an exception, the marriage of the wife's sister or brother's wife, the niece or the aunt.

Exactly the same is the state of the law in *Holland.* "Marriage is prohibited [q]," but "allowed under dispensation," "between brother-in-law and sister-in-law, legitimate or illegitimate; between uncle or great uncle and niece, or great niece, aunt, or great aunt, and nephew or great nephew, legitimate or illegitimate."

In Prussia, on the other hand, all these same marriages are permitted without dispensation. All is allowed except between "parents and children and their offspring; step-parents and step-children or parents-in-law and their children; brothers or half-brothers and their sisters." All else [r] alike is allowed, uncle or aunt, great uncle or great aunt. Yet, remarkably enough, even this law preserves

[q] See the Laws themselves, Evidence, p. 85, 86, note.

[r] See the marriage law of the Prussian dominions in its original words, Evidence No. 966. After enumerating the above, it says expressly, "In all other degrees of relationship and affinity, marriage is permitted, and requires no dispensation." Mr. Bach says, "In Prussia such a marriage [between uncle and niece] is permitted; but a marriage *with an aunt older in years* is only permitted under a dispensation on very special grounds; but it is not easily granted" (No. 982). The law, as he himself quotes it, No. 966, contains no such exception. There is the same obscurity in the answer of Dr. Helwig, App. No. 45, p. 147, "According to law, marriages between *relations* in *ascending* and *descending line* are interdicted" [these, in ordinary language, mean the *direct* ascending and descending line, grandparents, parents, children, grandchildren, &c., and these, it is emphatically said in the law, are *gänzlich verboten*, "wholly forbidden," Evidence, No. 966, sec. 3], "but to enter into a marriage with one near of kin of a collateral line, though in itself not permitted, a dispensation can, however, be requested, which is ordinarily granted, when the *respectus parentelæ* is not violated [what these marriages are, is not said. The law,

the principle, disputed by some of the advocates for this change[s], that the death of the wife or husband does not at all weaken the relation of affinity once formed by the

sec. 4, mentions only brothers, and half-brothers, and sisters, and is wholly silent about uncles and aunts, nephews and nieces]. But *affinity marriages* are in no wise interdicted, because there does not exist a blood relationship," [he must mean *these* "*affinity* marriages," for other affinity marriages are forbidden, "mothers-in-law, daughters-in-law, step-mothers, step-daughters," sec. 5, but then the reason he assigns falls to the ground, for neither in these "does there exist any blood relationship"], "therefore a dispensation is not necessary for concluding such a marriage."

[s] Thus, the Rev. J. Hatchard thinks that, because there was no affinity before marriage, there is none after it; and *because* a man may, *beforehand*, marry either of two sisters, *therefore* after he has married the one, he may, on her decease, marry the other. He is asked: "You are aware that some divines rest very much upon the position that the husband and wife are 'one flesh,' and that therefore the husband cannot marry the second sister without approaching to one near of kin?" "I am quite aware of that view." "What is your opinion upon that point?" "My opinion is that it is an erroneous view. If a man is paying his addresses to a lady in a family where there are two sisters, he certainly may marry either Mary or Sarah. I do not think that there is any consanguinity between a wife's sister and the husband, on which ground we should prevent it. I do not see that marriage with the one would prevent marriage with the other upon that score." "You are of opinion that, whatever the force of that expression 'one flesh' may be, the relation contemplated ceases by the death of the wife?" "I do; that is my opinion decidedly" (Evidence, No. 552, 553, 554). Mr. Hatchard probably did not observe that his argument applies equally to the wife's mother or daughter. To take his own words with this variation, "If a man is paying his addresses to a lady in a family where there [is a mother and daughter], he certainly may marry either [mother or daughter] Mary or Sarah. I do not think that there is any *consanguinity* [certainly not] between a wife's [daughter or mother] and the husband, on which ground we should prevent it. I do not see that marriage with the one would prevent marriage with the other on that score." And since it is his "opinion decidedly" that "the relation contemplated by the expression 'one flesh' ceases by the death of the wife," it must, according to him, cease in every case of affinity, and so with the mother-in-law or daughter-in-law, the step-mother or step-daughter.

marriage union. "These[t] prohibitions continue even when the marriage, through which the connexion between the step-parents or parents-in-law and children had its existence, was dissolved by death or a judicial sentence."

The evidence as to the rest of Germany is given generally only. Yet thus much appears, that, "under[u] dispensation, it is permitted generally throughout Germany for an uncle to marry his niece." One, and one only,

[t] *Ibid.* No. 966, § 5.

[u] The following statements in Mr. Bach's testimony bear upon this. "980. Is it permitted *generally throughout Germany* for an uncle to marry his niece?—Only under dispensation. 981. Is it the general law to allow it by dispensation?—No. The ecclesiastical law, both in substance and in practice, is very different in different parts of Germany, where there are so many sovereign states, each state with its own legislation. In the kingdom of Würtemberg, for instance, an uncle cannot marry his niece by the common law of the land; but even there, by a law of 1797-98, such a marriage is in certain cases indispensable. In the kingdom of Hanover an uncle cannot marry his niece. [Is *indispensable* a misprint for *dispensable*, since it is added, as an exception to the *prohibition* by common law, '*but by a* law of 1797,' &c.? yet, unless it is dispensable, it is no exception.] 982. But in some parts of Germany he can?—In some parts he can. In Prussia such a marriage is permitted. 990. Is the marriage of an uncle with a niece considered incestuous?—In a very great part of Germany it is not; in some parts of Germany it is; but I must beg leave to state again, with regard to marriages between an uncle and a niece, that they are exceptions to the general rule." This absence of specification is very unsatisfactory. Mr. Bach's attention had been directed to the question of interested parties, "what is the law as to the deceased wife's sister or niece?" it had not to the general subject of the marriage laws of his country; and so we have these unsatisfactory and vague answers. The marriage between uncle and niece "is *generally* allowed *throughout* Germany, only by dispensation," but "it is not the *general* [I suppose *universal*] law to allow it by dispensation," for the ecclesiastical law is very different in different places, and "*in a very great part* of Germany *it is not considered incestuous;* in some parts it is." But whether these parts in which it is so accounted are Roman Catholic or Protestant, or other than Hanover, is not said.

clear, remarkable exception there is,—for it is through the connexion with this country,—Hanover. There, "up [x] to a certain time in the last century, these marriages were prohibited, and no dispensations could be obtained for them." Even now it is said that "an uncle cannot marry his niece there." No other exception (except, perhaps, the kingdom of Würtemberg [y]) is given. This, indeed, is not the way in which evidence ought to have been procured. Had the question been about commerce, agriculture, criminal law, constitution, free trade, copyright, any thing which affects man's secular interests, no one would have thought of laying before those whom it concerned one single item of the subject, irrespective of its bearings upon the whole. If it concerns us to know at all what is the actual state of the marriage law in other countries, it concerns us to know the whole. But now, on an *ex parte* inquiry, the practice of other nations is set forth to us as an overwhelming argument on one point, upon which they differ from us without agreeing among themselves, and all the rest is ignored, unless it had accidentally come out. An appeal is made to our modesty and humility. "What! are you in England alone right, and divers European nations all wrong?" But what, if the whole state of the marriage law in those very countries be such that we cannot, dare not, follow it? Let it be laid before Englishmen, and they would at once say, "We will not pollute the honourable estate of marriage with such defilements as this." We are not prepared, either by dispensation or otherwise, to invade the fatherly relation of uncle and niece. What to us, then, is such legislation as that of France, Holland, Prussia, which treats incest with a niece in exactly the same way as, *upon their authority*, we are recommended to do

[x] Evidence of A. Bach, Esq., No. 969.

[y] *Ibid.* No. 981, and see note, p. lxxxiv.

that with the wife's sister? We are not prepared, as Englishmen (I speak not now of the English Church), to make marriage a matter of state policy, and allow of divorce on any other ground than that on which our Lord permitted it. Marriage is altogether in a degraded [z] state, when parties on mutual consent can have the marriage vow dissolved, and each marry anew, as they will. When this is so, marriage is not that hallowed bond by which they twain become one flesh, until death do them part.

II. It was to this end that, when the practice of some foreign nations was urged against me, I referred to those other incests and the state of divorce, not as implying that there were more divorces *in this specific relation*, but that countries where the whole view of the marriage relation was so little sacred were no precedent for us. And this does appear in the Evidence itself. A German lawyer employed to procure evidence as to the marriage of the wife's sister, admits thus much: "Our divorces in Germany, I regret to say, are too frequent. Our reformed consistorial courts were, perhaps, somewhat too lax in the beginning of the Reformation upon that point;" and again: "In Germany are all divorces *a vinculo matrimonii?*—Yes, and also *a mensâ et thoro.* But the grounds for which a divorce *a vinculo matrimonii* is obtained with us are more numerous than the law of England allows. Our legislators in Prussia are desirous now to render the divorce *a vinculo* rather more difficult; but it is a difficult task [a]." Again, then, the German marriage law is at a lower stage than that of heathen Rome during its first 520 years. This evidence, then, which is intended to meet

[z] A case was lately mentioned, in which one highly connected was about to re-marry the husband from whom she had been divorced on account of some differences, the husband whom she had had meanwhile being dead.

[a] Evidence, No. 973.

what I said, confirms what I meant. I meant that the whole state of the law of marriage in Germany was bad. It admits laxity in dissolving the bond of marriage itself, so as to allow parties to re-marry. Yet on every case in which this permission is acted upon, what says our Lord Himself? "Whosoever shall put away his wife, saving for the cause of fornication, causeth her to commit adultery; and whosoever shall marry her that is divorced, committeth adultery." This reformed marriage law of Germany, then, sanctions what our Lord solemnly pronounces to be adultery; and every one who avails himself of its sanctions is living as an adulterer in God's sight, though under the sanction of the law of man. And is a marriage law which sanctions adultery to be our pattern in our estimate of what is incest? The "reformed consistorial courts" made "a law of divorce" different from that of our Lord; and while they find it hard to retrace their steps in this, we are invited, on the strength of their authority, to imitate them in another point, wherein they also threw off the Divine law, as that law was understood for fifteen centuries in the whole Church of Christ.

Yet in this very point their own history is an instructive warning. When was this change made? in a time of religious fervour according to their system, or of coldness and decay? They themselves say, that when the Canon law was modified, "*the* [b] *Levitical law, as the revealed law by Divine dispensation*, became the groundwork of the Protestant ecclesiastical law in Germany." The marriage with a deceased wife's sister came to be permitted among Protestants by dispensation "since [c] the middle of the 17th century." This was notoriously one of the worst periods of German morals till then; when the stir of mind amid which the Reformation took place

[b] Evidence, No. 989.

[c] *Ibid.* No. 965.

had subsided, and the thirty years' war was just over, which had swept over Germany with a flood of moral desolation and degradation and profligacy; and faith, according to their own writers, was dead, and religion was stiff,—such, according to this account, was the time when the marriage law was changed; it is the produce of such a time which we are called upon to copy. The further law of Prussia was the produce of the period immediately succeeding that of the infidel Frederick, and shortly following that of Voltaire's influence in that court. The relaxation in France is of sixteen years'[d] standing, shortly after their second Revolution; it allowed the King to give dispensations to uncle and niece, nephew and aunt, brother-in-law and sister-in-law. Now, I suppose, that France has no King, this law is in abeyance.

Most of this legislation was upon a principle essentially faulty, and which we should acknowledge to be such. The continental Protestants made the civil sovereign their "Summus[e] Episcopus," and so they aggravated every evil of "dispensations," by conferring the power of relaxing in a matter of so solemn and sacred a

[d] It was made in 1832.

[e] "Since the Reformation, the judicial rights of the Summus Episcopus have been assumed by, and conferred by the Church evangelical upon, the sovereign. The sovereigns, or those bodies exercising sovereign power, in all the Protestant parts of Germany, instituted their own Consistorial Courts, which are composed partly of divines, called Consistorial Councillors, and partly of secular judges, and which courts have jurisdiction in all matters relating to marriages and divorce. They grant dispensations in the name of the sovereign; and a marriage with a deceased wife's sister is held to be a dispensable marriage throughout Protestant Germany." No. 965. It appears, however, by a subsequent statement, that dispensations are given by an authority purely *civil.* No. 977. "Must there be a dispensation in every case from some ecclesiastical authority?" "Not always; either from our consistorial courts, *or the judicial department of the ministry of justice, who grant a dispensation in the name of the sovereign.* The dispensation is generally granted, except in case of previous adultery."

character, upon a temporal prince, or court appointed by him. Louis XIII [f] gave dispensations as to marriage of those near akin among Protestants. Yet radically wrong as this is, still it was some degree of protection against further laxity. Even to this day, the very witness whose evidence is brought to induce us to assimilate our marriage laws to theirs insists on the value of dispensations. Marriage with a niece, he says [g], is allowed "only under a dispensation," "a dispensation is rarely granted for such a marriage," "weighty reasons must be shown to induce any Consistorial Court, or any other ministerial authority acting under the Sovereign's prerogative, to grant a licence." And yet, in the face of this, and of the example of the most influential part of Germany doing away with this safeguard, such as it is, to which he yet clings, we are invited partially to adopt a system, such as it no where exists in those countries who are to be our examples. We, whose stability Europe admires, amid its own confusion, are invited to abandon laws which have been held sacred by Christendom from the first, and try our hand among the experiments of their modern [h], unproved legislation.

III. The remaining point upon which I spoke was the

[f] This case is mentioned in the Code Matrimonial, t. i. p. 431. Generally, the Protestants in France were, by the civil law, subjected to the canon law, both as to consanguinity and affinity, except that in the 3rd and 4th degree, "they were not to be molested, nor the validity of their marriages questioned, nor their succession to property questioned." Edit. de Henri III. A. 1576, Code Matrim. t. i. p. 106. See the other edicts referred to, under the head Protestans, sec. ii. t. ii. p. 848, 9.

[g] Mr. Bach's Evidence, No. 978-982. 984. 990.

[h] The law of Holland is of 1839, the dispensing law in France of 1832; the kingdom of Würtemberg made a change in 1797-8: Hanover amid the rationalism of the last century (at the same period at which rationalist professors were by the ministry at Hanover appointed at Göttingen); Prussia in 1791.

breaking up of domestic relations. This is, of course, quite subordinate to the question of the lawfulness of these unions at all. But it is one aggravation of the evil of the change of law contended for, that, under the pretence of setting marriage free, it hinders all intercourse which has not marriage for its end. To this, it is said (as it is thought) in answer, 1) that the permission to marry the sister-in-law does not lead to adultery now in states where it is allowed [i]. I never anticipated, certainly, sin so atrocious as the consequence of a change in the law. I spoke not of consequences, but of facts. Uncles in Germany cannot be the domestic protectors of their own nieces, nor can brothers-in-law have the motherly care of the sister of their deceased wife, unless they marry them, *because* [k] they can marry them. But apart from the extreme case of sin, none who know any thing of the tenderness of the female mind, and of that leaning towards her husband, the fruit of the primæval law, "Thy desire shall be unto thy husband," and her earnest clinging to his undivided love, can think it a light thing that her nearest of kin might seem to be her rivals. Now all are sacred, pure, holy, because they are her husband's sisters, nieces, as well as her own. None can divide the love which is hers; none wish to succeed her. But further still. A person can know very little of that mysterious law which draws the sexes towards one another, and not know that the relation is quite different when marriage can be, and when it cannot. Now all is safe. No other feeling can spring up (it would be a sort of monster), except that pure love of relationship or affinity which may, and, one should think, would live on, "like the Angels of God in heaven." It was not of this that I was speaking; yet, since it is brought forward, it must

[i] See Evidence, Qu. 971—974, and 1188.

[k] This is already put forward as the ground in a case made much of, Lord G. Hill's, No. 299. 306, 7.

be said that there may be much short of any extreme sin, which might yet embitter marriage, or mar that oneness of family affection, which now is so beautiful a part of our English domestic relations.

Some have tried to make out, 2) that already a young [l] widower could not have his sister-in-law's society; and for this some four or five cases are alleged, in which, from the uncertainty [m] of the law, worldly [n] relations have thought this inconsistent with the ways of the world. 3) That if it were so, it might be productive of misery [o].

Yet this would only be so, because some persons have deadened themselves to the Divine law; and this agitation has thrown uncertainty over the human. It is but a part of the manifold negligence in which, as a nation, we have been involved. When it is clear by the right understanding of the Divine law (what now is acknowledged, more or less distinctly, to be largely felt) that there is something wrong about these marriages; that the sister-in-law and the mother-in-law are an acquired sister and mother to the husband, there then would be no danger of scandal or unhappiness. They who do not see this, the whole world is before them. Let them marry whom they

[l] See, *e.g.*, the extreme case put, Qu. 1229, of the widower being but 24, and the sister-in-law 18. "Shame to him who thinks evil of it." And again, 397, the Rev. J. F. Denham gives the obvious, feeling answer, "Certainly, where there are children, no danger at all. It would be understood by every right-minded person in society, who would commend the conduct of a sister in going to take care of her deceased sister's motherless babes."

[m] The cases 262. 610. 645-9. 299. 306, 7, are of marriages brought about in this way. The case 736 is an instance how the Act of 1835, absolutely prohibiting these marriages, facilitated the sister-in-law residing in her brother's house. See also No. 1345, end.

[n] "The *world* thinks that woman [the sister-in-law] a stranger to the man; and because the *world* thinks her a stranger, it does not think it wrong that he should marry her." Evidence of the Rev. J. B. Owen, No. 818.

[o] Anon. Letter, App. No. 36.

will, "only in the Lord." If their affections have been holy in their wife's lifetime, they are not pre-engaged. Let them seek elsewhere, if need so require, with whom to renew the state of marriage. But let them not doubly bereave those who cannot. Let those who can have no other mothers for their children, because they can love no other with a husband's love, not be deprived of her care who is to them now the more a sister, merely because others cannot be content to have her only for a sister. People's sympathies have been appealed to all in one way. As is the wont of men, the quiet and retiring are to be sacrificed to the clamorous. Both states of things cannot be. If men are to be freed to marry their wife's sister, others who would, cannot have their society as sisters. This has been verified in Germany. Among us it would be the more felt, because the relation is now, for the most part, so sacred an one. The husband's house is now so often the home of the orphan, unmarried sister. The change (says one [p] who writes very thoughtfully, and with knowledge of facts) "would throw thousands of helpless females on the world. The feelings of married females, be they right or wrong, yet, as facts, must be considered as ingredients in directing legislation. I have asked the opinion of several so situated, who say, that if their sisters could not live with them as the *sister of the husband also*, their continuing to live with them would be impossible. I have asked widowers also, who say that a change in the law would break up their establishments. And after such a change, it must seem obvious, that on the death of a man's wife, he could not, as now, bring in her sister to take care of her children (and where could he find a person so calculated to care for them?), unless he had made up his mind to marry her. And, under such

[p] Letter of the Archdeacon of Meath, inserted in the Letter of the Bishop of Meath to Dr. Lushington, App. No. 44, p. 157.

circumstances, how few women would undertake the care of their sister's children in the houses of their brothers-in-law."

And now, what is to be done, but in our prayers at this solemn season to beseech Him in Whose Hand are men's hearts, to turn from our land this pollution; from our families, this first inroad into that domestic union, which, above all things, has made us "blessed in our going out, and blessed in our coming in;" from the State, the sin of declaring that to be lawful which is prohibited by God's law; and (if the State should unhappily do this) from our Church, all part and lot in breaking the laws of God? "Ye shall be holy unto ME; for I the LORD am Holy."

CHRIST CHURCH,
Lent. Vigil of St. Matthias, 1849.

THE

LAW OF MARRIAGE,

&c.

Evidence of the Rev. *E. B. Pusey*, D.D.

418. YOUR attention has been directed to the consideration of marriages within the prohibited degrees of affinity?—Yes, it was, some time ago, by the application of those who wished to promote them.

419. And you published a letter, which is now before the Commissioners?—I did.

420. Will you have the goodness to state to the Commissioners whether you consider that those marriages are or are not prohibited by the law of God?—I consider that they are.

421. Are you of opinion that they are prohibited by any direct reference to the words of Scripture?—Yes, by the words of Scripture itself.

422. Are you aware of any passages of Scripture which have reference to this subject, and support the view which you now take, beyond those which are mentioned in your pamphlet?—The chief passage is Leviticus xviii. 6, "Thou shalt not approach those near of kin." It has been understood universally of the prohibited degrees.

423. Do you refer to that particular passage in proof of your opinion that such marriages are prohibited by Scripture?—Yes; it has been understood all along in the Christian Church that the specific cases mentioned under

that law are not co-extensive with the law, but only instances under it.

424. Then your construction of that passage (taking it first without reference to Church authority) would be that it does prohibit this description of marriage?—Yes, I would most decidedly take it as distinct from Church authority; but if you will allow me I will mention the grounds. First of all, the whole chapter is in contrast with heathen practices, those of Egypt and Canaan. God says in it, "Ye shall not do after *their* doings or *their* ordinances, but *my* judgments, and *my* ordinances, and *my* statutes," in the 3rd, 4th, and 5th verses of that chapter. And it concludes with, "Ye shall keep mine ordinances, that ye commit not *any of* those abominable customs."

425. Is there any reference to any specific customs in that passage of Scripture?—It says, "the customs of Egypt and Canaan."

426. But as to what those customs were, is there any evidence to show that?—They are plainly the customs mentioned in the whole chapter. It begins by saying, "Ye shall not do after the customs of those nations, but ye shall keep my judgments, my ordinances, and my statutes;" and amongst those customs is that forbidden by the 6th verse. Further, it is clear that all the prohibitions in the whole chapter are moral, not ceremonial or judicial, for *all* the acts prohibited God speaks of as "defilements." For it is said (v. 24—26), "defile ye not yourselves with *any* of these things, for *in all these* the nations are defiled and the land is defiled; ye shall therefore keep my statutes and my judgments, and shall not commit *any of these* abominations."

427. Then are you to be understood as meaning that all the customs of the Egyptians and the Canaanites are prohibited in your opinion by virtue of that prohibition contained in that chapter, and that those things alone are lawful which are pointed out by that chapter as the judgments of the Lord?—I suppose that the chapter alludes to certain customs and practices of the heathen, the Egyptians and the Canaanites, and that they are opposed to the customs which Almighty God lays down;

or rather, Almighty God prohibits those things which, we must infer from the chapter, were practised by the Egyptians and Canaanites: we know that there are incestuous marriages in Egypt.

428. But those customs are not defined in the chapter, are they, so as to point out clearly what those customs were?—Since the preamble of these laws (so to speak) is, "Ye shall not do after the doings of the Egyptians and the Canaanites;" and then Holy Scripture goes on to lay down certain acts which they shall not do, and sums up, "Defile ye not yourselves in any of these things;" it seems quite plain that these things, here specifically forbidden, were the practices of those nations prohibited generally at the beginning of the chapter. But my object in mentioning this, was in proof that these precepts are moral. The chapter speaks of certain practices of the heathen as being abominations, and as defiling the land in which they lived. Then it prohibits certain things, and says, that whereas there were certain practices in Egypt and Canaan which were defilements, they shall not do any of those things. From that I infer that the laws prohibiting them are not ceremonial laws, but that they are judgments of God as opposed to the abominations of the heathen.

429. Are you to be understood as coming to the conclusion, that, by virtue of the whole of that chapter, it is sufficiently clearly pointed out that marriages of this description were intended to be prohibited; that is, marriages within the prohibited degrees of affinity?—I hold, as the Church of England does, that both the specific instances given under the general prohibition, "None of you shall approach to any that is near of kin to him, to uncover their nakedness," and those which are equal to those instances, and which are like in principle to those instances, are prohibited. I believe that those prohibitions in the 18th chapter of Leviticus are binding now as part of the law of God.

430. And you consider that it is not only what is there specifically mentioned, but every thing *ejusdem generis*, and that those marriages are *ejusdem generis?*—Yes.

431. That is a fair exposition of your opinion?—Yes; and that view is absolutely necessary, because marriage with a daughter is not mentioned there, neither a daughter nor a grandmother, nor grandfather's wife. Marriage with a daughter is manifestly against the law of nature; and since incest with a daughter, as well as with a mother, was even a common sin among some heathen nations, and has even occurred within Christianity, it cannot be argued that it was omitted solely because unlikely to happen. We cannot see the principle upon which one case has been mentioned, another not. Yet it is within people's memory that one applied for a licence to marry a grandfather's widow (a second wife), and was refused.

432. Then you infer, because there are certain marriages not expressly prohibited, which in the feeling of the whole Christian world are wrong, that these marriages by affinity are *ejusdem generis?*—No. What I infer is, that since what is plainly against the law of nature, since manifest incest is omitted, therefore it cannot be argued that those specific instances are all which were meant to be prohibited.

St. Ambrose uses the same argument as to one of the cases not mentioned in Holy Scripture, marriage with a niece. He says, "If thou therefore thinkest it permitted, because it is not specially prohibited, neither wilt thou find that prohibited by the letter of the law, that a man should not take his own daughter to wife. Is it therefore allowed because it is not prohibited? By no means. For it is forbidden by the law of nature; it is forbidden by that law which is in the hearts of all; it is forbidden by the inviolable prescription of piety; by the plea of a near bond. How many things of this sort wilt thou find not to be forbidden by the law given by Moses, and yet they are forbidden by a certain voice of nature?" (Ep. 60, ad Paternum, § 5.) Indeed, the rule of parity of relationship or affinity, upon which the Church of England has proceeded in prohibiting marriages, seems self-evident. Since marriage with a father's brother's wife is expressly prohibited (v. 14), it cannot be thought that marriage with

a mother's brother's wife is permitted. Since marriage with a son's wife is prohibited (v. 15), it cannot be thought that marriage with a son's son's wife or a daughter's son's wife is permitted. And this *principle* as to *affinity* as well as consanguinity was admitted by the ancient Jews. (See Talmud, as quoted by Selden, Uxor Ebraica, c. 2.)

433. Do you put upon the same footing marriages of persons connected by consanguinity and by affinity?—Yes; I regard them as the same—of course not the same in intensity, but equally prohibited. Of some sorts of incest with those connected by affinity, Holy Scripture speaks as strongly as of incest with those of the same blood. Thus in Lev. xx. 12, incest with a daughter-in-law is pronounced "confusion," contamination. It is the same word used in Lev. xviii. 23, of sodomy. And incest with a wife's daughter, or her son's daughter, or her daughter's daughter, or her mother, are called "wickedness," Lev. xviii. 17; xx. 14, a word used of the foulest sins of the flesh, as of "adultery," in Judges xxxi. 10, of the abusing of the woman (Judges xx. 6), of which it is said (Judges xix. 30), "There was no such deed done or seen from the day that the children of Israel came up out of the land of Egypt;" and in Ezek. xvi. 43, as a stronger word than even "abomination." The same word is used in Ezek. xxii. 11, of incest with the daughter-in-law.

Death also is the punishment inflicted on incest with the father's wife, or the daughter-in-law, or the wife's mother or daughter (Lev. xx. 11, 12. 14); whereas, for incest with a half-sister or aunt, no judicial punishment is annexed, but they are left to the judgment of Almighty God. It is said of these, "They shall bear their iniquity" (Lev. xx. 17. 19). If the greater punishment of sins of the same kind indicates (as seems probable) their greater offensiveness, then some incests against affinity are marked as worse than even incests against consanguinity, which yet would be felt by human nature to be very grievous incests.

434. Having referred to that chapter in Leviticus, and also

to other passages in this letter of yours, are there any other parts of Scripture which you think bear directly upon the question now under consideration?—A marriage with a brother's wife is directly prohibited in this chapter; and it is also spoken of in the 20th chapter of Leviticus, ver. 21, as being in itself something abhorrent (which I think I have not mentioned in my pamphlet). The word is one very strongly expressing that it is an abominable thing in itself, unless Almighty God dispenses with it in any case. He Himself speaks of it in Leviticus, chap. xx. ver. 21, as being an abominable thing.

What then Almighty God so speaks of in His word, cannot cease to be so. For causes relating to the Jewish people, He in one case dispensed with His own laws; as at the beginning of the world He willed that all should descend from one pair, and so rendered the marriage of brother and sister necessary in the first generation from Adam. But, as St. Augustine says of that case, "as it is older than all, necessity thereto constraining, so afterwards it was made more damnable, religion forbidding it." (De Civ. Dei, xv. 16.) So God commanded utterly to destroy the Canaanites and the Amalekites; but the same acts, when not directed by God, are condemned as sin, and punished. Whenever the specific exception ceases, the general prohibition holds universally. And this may explain why the prohibition is given thus absolutely, "Thou shalt not uncover the nakedness of thy brother's wife; it is thy brother's nakedness" (Lev. xviii. 16), as a law binding as long as the principle itself implied in it, and the exception which is peculiar to the Levitical law, is mentioned elsewhere (Deut. xxv. 5), quite independently of it. It has been noticed as a difficulty, and as contrary to what might have been expected, that the marriage with the brother's widow is universally and absolutely prohibited here, while elsewhere, in the same book of the law, it is in a particular case enjoined. This is explained, if the prohibition in Lev. xviii. is regarded as part of the moral law, binding for ever, and so it is enunciated absolutely as a general principle for

all nations and times (as the other offences in the chapter are prohibited at all times), while the particular exception peculiar to the former dispensation is mentioned apart. But since marriage with the brother's widow is declared to be a thing intrinsically repulsive to nature, when this law is not superseded by Almighty God Himself, I know not on what ground it can be maintained that marriage with a wife's sister is otherwise. For the principle upon which these prohibitions proceed in God's law itself is, that "man and wife" being "one flesh," what is an offence against one is an offence against the other. Hence to uncover the nakedness of the mother, or the father's wife, is to uncover the nakedness of the father (Lev. xviii. 7, 8); to uncover the nakedness of a father's brother's wife, is to uncover the nakedness of the father's brother (Lev. xviii. 14); to uncover the nakedness of a brother's wife, is to uncover the nakedness of the brother (Lev. xviii. 16). And so, purity in the two sexes being the same, for a woman to marry one who has by marriage been made "one flesh" with her sister, is the same sort of confusion and shame, as for a man to marry one who has by marriage become one flesh with his brother. This is the principle of the whole subject of affinity in the Christian Church (as indeed the Karaites laid down, that the man and wife being one, "those of kin to the wife were forbidden to the husband as his own,"—see Selden, Uxor Ebraica, l. 3). Thus St. Augustine says, "For if man and wife, as the Lord saith, be no more two but one flesh, the daughter-in-law is to be accounted of no otherwise than the daughter." (Cont. Faust. xxii. 61.)

35. Have you any thing further to add with respect to these marriages being prohibited by the words of Holy Writ? —No. I regard these prohibitions as being moral, and so universally binding, both on account of the way in which these marriages are introduced in connexion with other acts which are offences and outrages against nature, and on account of its being so emphatically repeated and impressed (v. 4, 5. 26. 30) (as is the wont of Holy Scripture in things of greatest moment), that these acts are

contrary to the laws, ordinances, and statutes of Almighty God (terms not confined to the ceremonial law). It is to be observed also, that these laws are given distinctly from the judicial laws which follow in the 20th chapter. Here Holy Scripture lays down positively these as things not to be done. What is proper to the Levitical law is in another (the 20th) chapter, where the same degrees are mentioned again, and a penalty annexed to intermarriage within them.

436. Are you of opinion that that expression "near of kin," as in our version of the Holy Scripture, is not a literal translation of the Hebrew?—Literally, it would be "flesh of his flesh." But ours is an adequate translation, though not so strong as it really is.

437. One of the witnesses has stated that the literal meaning would be "the remainder of his flesh." Is there any thing in the Hebrew which implies that?—No. I think it is a false etymology. The word signifies "flesh" elsewhere. There is some Jewish authority for it; but I have no doubt that that is not the meaning, and it seems to be recognized generally not to be the meaning.

438. Do you apprehend that the construction put by the Church upon this chapter of Leviticus (which you have quoted), from the earliest times from which it is possible to investigate it satisfactorily, has been that these are prohibited marriages?—Yes, I do.

439. Have you been, in the course of your researches, able to ascertain at all the precise period when this subject first became a matter of discussion in the Christian Church?—I should wish to mention, first, that the ancient Jewish authorities (that is, both the Talmuds, the Jerusalem as well as the Babylonish) considered these laws as not confined to the Jews alone, but as binding upon the heathen also; and they, as well as the Christians, considered the general rule as more extensive than the particular instances; that the chapter does not give all the instances. Both the Talmudic authorities and the Karaites think that more degrees were prohibited than were actually set down, and, among others which they mention, is that of the daughter.

440. The Talmudists hold that this particular marriage was not prohibited, and the Karaites that it was?—Yes; they allowed marriage with the sister of the deceased wife.

441. Which is the prevailing sect of those two in the Jewish community?—I have no doubt, the Talmudists. I do not think the Karaites have any weight against them.

442. In fact, the prevailing construction in the ancient Jewish church was against the prohibition?—Yes, that a man might marry two sisters.

443. Then, in fact, the practice was to allow such marriages?—Yes, they seemed to think that it was allowed to *them.* Yet so was polygamy. And it should be observed how it has been part of the dealings of Almighty God, gradually to restrict the degrees of marriage. At first He willed that it should be necessary that brothers should marry their sisters; Jacob was allowed, by God's providence, to marry two sisters at once; Moses and Aaron were born of a marriage with a father's sister (Ex. vi.), which was forbidden in the law. Caleb's younger brother married his niece (Judges i. 13), as did Abraham, if not his half-sister. In the law itself, divorces were allowed on account of the hardness of their hearts. These last were forbidden expressly by our Lord Himself. And, in matter of fact, the same marriages which are forbidden in the Levitical law, as now interpreted in the English Church, have been held to be forbidden in the Christian Church from the first.

444. When was the earliest period in the Christian Church at which notice was taken of these marriages?—In the Apostolic Canons, canon 19, one who had *so* married, or had married a niece, was for ever excluded from the clergy.

445. What is their date?—I can only say that it is an Ante-Nicene collection. I mentioned in my letter what St. Basil says. Some observations having since been made upon it, I may say that the language of St. Basil is exceedingly strong, for its having been an universal hereditary practice to forbid the marriage with the sister of the deceased wife. First of all he speaks of it as being

something unheard of, which people would shudder at[a], which is the same expression nearly as that of Holy Scripture, נִדָּה, the same word which the Holy Scripture uses as to a brother's marriage. He speaks of the desire as "lascivious" (ἀσελγές). Then he speaks of "the practice established among us having the power of a law, because these laws" (using a word[b] which means sacred laws) "have been delivered down (παραδοθῆναι) to us by holy men." So that he speaks of it as a traditional custom before his time, and this as an exception which anybody would shudder at. He says, "The practice has been, if any one at any time, overcome by an unclean passion, falls off into a lawless union with two sisters, that this be not accounted marriage, nor that they be received at all into the congregation of the Church before they be parted from one another." It is translated in my pamphlet. I only advert to it now to show that the words do refer to an universal sacred practice. Then in 315, at the Council of Neo-Cæsarea, one who married two brothers was excommunicated till death, unless in case of sickness. Then there is an important piece of evidence from a law passed by Constantius and Constans, A.D. 355[c]. The Roman law did not prohibit these marriages; and, therefore, the decrees of the Christian emperors, forbidding these marriages, were, probably, an adoption of the existing laws of the Church, in the same way as they made laws, at the same time, with regard to keeping the Christian festivals holy, keeping the Lord's day, and other days. I think that the words are strong, because he says that it had been lawful up to that time. It is in the Theodosian Code (Lib. iii. Tit. 12, De Incestis Nuptiis, leg. 2). He says, "Although the ancients (that is to say, the old Romans) believed that it was allowable, after the marriage of a brother was come to an end, that his brother

[a] He expresses his surprise that Diodorus did not shudder (ἔφριξε) at the question. (Ep. 160, ad Diodor.)

[b] θεσμούς. Immediately afterwards he speaks of this union as "lawless," ἄθεσμος; compare the use of the word ἀθεσμία, ἀθεσμόλεκτρος.

[c] Arbetio et Lolliano, Coss.

should marry his wife, and that it was also allowable, after the death or divorce of a woman, to contract marriage with the sister of the same, let all abstain from marriages of this sort, nor let them think that legitimate children can be begotten from such unions, for that they who shall be born are spurious." So that we actually know from the Roman laws (which I have investigated lately [d]) that these marriages were allowed, and that as soon as the empire became Christian, these marriages were prohibited by force of law. There was a succession of laws, prohibiting marriages allowed by heathen Rome. Marriage with the sister-in-law or brother-in-law, in whatever way the former marriage came to an end, was again prohibited by Valentinian, Theodosius, and Arcadius [e], to Cynegius (about A.D. 388), and then by Honorius and Theodosius II. [f] A.D. 415. Soon afterwards St. Augustine mentions in his De Civitate Dei (written between A.D. 413 and 426), xv. c. 15, that though the marriage of first

[d] Selden speaks vaguely, as though marriage with the wife's sister, or the brother's widow, were also prohibited by the Roman law (de Jure Nat. v. 11). Marriages forbidden by that law as incest, were with parent or child, granddaughter, grandmother, mother-in-law, or step-mother, grandfather's wife, daughter-in-law, or wife's daughter, or grandson's wife, or great-grandson's wife, and so on *ad infinitum*, both ascending and descending, aunts on both sides, or great aunts, sister, or half-sister (Paulus Sent. Recept. ii. tit. 19, et ff. de rit. Nupt. l. 14 and 68; Gaius, l. c. tit. 17), and adopted children, even if emancipated, and an adopted sister, until the son be emancipated, and even an adopted aunt, and brother or sister's daughter or granddaughter. It is also expressly said that marriage with some women was to be abstained from, out of reverence for their affinity; a wife's daughter, or a son's wife, were not to be taken to wife, "for both are daughters; nor the mother-in-law or step-mother, because they are in place of a mother." But a wife's daughter by a previous husband, and a husband's son by a previous wife, or the converse, might marry each other, although they had a brother or sister from the subsequent marriage (Instit. i. tit. 10). Yet marriage with a niece (Vitellius could say) "was not forbidden by any law" (Tac. Ann. xii. 6): and, perhaps, on account of some laxity which had crept in after Claudius, the first law on marriage, after the state became Christian (Constantinus Constans Coss. A.D. 339), was one which inflicted death on marriage with a brother or sister's daughter (Cod. Theod. l. iii. tit. 12).

[e] Honor x. et Theod. II. vi. A. A. Coss.

[f] Valentinian, Theod. et Arcad. Cynegio. Cod. Justin., L. 5, tit. 5, de Incest. Nupt. 1, 2.

cousins was lawful, yet being so near the degree of brother and sister, they were very rare. He is speaking in contrast with the first age of the world, when it was necessary to marry a sister, and he says that mankind so turned from it, as though it could never have been lawful. And, he adds, "We have experienced, in the marriage of first cousins (consobrinarum), in our times also, that on account of the degree of propinquity being very near (or next, *i. e.* in the descending line, proximum) to the degree of brothers, how rarely that took place, by reason of men's right feelings, which was allowed to take place by law (quam raro per mores fiebat, quod fieri per leges licebat). But even an allowed act men shrunk from (horrebatur), on account of its nearness to one unallowed; and what was done with a first cousin, (consobrinâ; the Latin word is formed to express the relation to the sister,) "seemed almost to be done with the sister; for that these, also, on account of consanguinity so near, are called brothers and sisters, and are almost such (germani, whence "cousins german"). Not long before that, there had been a law of Theodosius, forbidding the marriage of first cousins. Before the law of Theodosius then, the marriages of cousins were very rare, on moral grounds—*à fortiori* marriages, which were very much nearer than those of cousins. In another work, supposed to have been written about A.D. 419, and so containing his maturest judgment, St. Augustine speaks of the prohibitions in Lev. xviii. as "things without all doubt to be kept under the New Testament." He raises the question, why the particular command (Lev. xviii. 19) is repeated here; whereas the act forbidden had already been sufficiently prohibited before; and he says, "Is it, perhaps, lest what was already said above should be thought to be understood figuratively, that it is set down here also" (c. xviii. the chapter containing the prohibited degrees), "where *things of that sort are forbidden, as in the time of the New Testament also*, when the observation of the ancient shadows is done, *are certainly to be observed?*" (Quæstt. in Lev., qu. 64.) And in a work yet later (A.D. 427), consisting of extracts from Holy Scripture,

for popular use, as to "those things, which, whether as commanded, or forbidden, or allowed, are so laid down in Holy Scripture, that *now also*, i. e. *the time of the New Testament*, they belong to the leading of a holy life and to morals" (Præf. ad Speculum), he gives at full length the laws from Lev. xviii.

46. Were there not at that period very many marriages prohibited by the laws passed at that time which are allowed by our Church, at present, and constantly practised?—Not that I am aware of. St. Ambrose expresses his conviction that first cousins might not marry; but the later degrees seem to have come in a good deal after that. St. Augustine says explicitly that the Divine law did not prohibit the marriage of first cousins.

47. Were there not instances of the marriage of parties connected by adoption being prohibited, and marriages of parties connected through godfathers and godmothers?—The old Roman law prohibited a father from marrying his son to an adopted daughter, unless he had previously emancipated him; and this is acknowledged by Pope Nicholas, A.D. 866 (in the Decreta, p. ii. caus. 30, qu. 3, c. 1). Marriage with a goddaughter was forbidden in the Justinian Codex (A.D. 529) (and this, I suppose, would now also seem not natural). At the Council of Trullo (A.D. 692), it was forbidden also with her mother; and in the West, A.D. 721, by the Conc. Rom. i. and A.D. 813, by the Council of Mentz (Mog. c. 55), and in the Responsa Steph. ii. A.D. 752; there are also notices of it in the time of Charlemagne, A.D. 768 (Capit. v. 100, vi. 316, of Chilperic and Armoinus, Hist. Fr. iii. 6). Marriage was declared to be forbidden between a person's children and his godchildren by Pope Zachary, A.D. 745 (caus. 30, q. 3, c. 2), but these are later than the times I am speaking of; nor is there any ground to think these regulations to be those of the Primitive Church.

48. None of those were earlier?—None earlier.

49. Those prohibitions you conceive all to have been of much later date than the authorities to which you now refer?—The earliest (that with a goddaughter) is above a century later.

450. There was a contention in the times of which you are now speaking against the marriage of cousins, was not there?—There was a civil law forbidding it.

451. Was there not at that time a contention that it was forbidden also by the law of God?—There is a difficult passage of St. Ambrose, in which, in arguing against a marriage between an uncle and a niece, which was the case in which he was applied to, he assumes, that by the law of God the marriage of first cousins was prohibited; but whether it was a slip of memory in St. Ambrose I do not know. He certainly seems to mean an express prohibition in the words of Holy Scripture; for against the marriage of an uncle and niece, which Paternus had pleaded for, "as permitted by the Divine law, because not prohibited," St. Ambrose argues *à fortiori:* "But I assert that it is prohibited, for since the slighter as to first cousins are forbidden, much more do I deem this forbidden, which is full of a closer nearness." He had said just before, "the Divine law forbids first cousins to marry;" and since he argues from this to a case not *expressed* in Holy Scripture, it would seem that he must have meant that *this* was expressed. So that it cannot be an inference from the general law, Lev. xviii. 6, for that would apply more strongly to the case of the uncle and niece. Persons have a difficulty in explaining the passage; they do not know what St. Ambrose means.

452. St. Augustine repudiated that construction?—He did by implication, since he says that the marriage of first cousins was not prohibited by Divine law; even while he speaks of the extreme rareness of the practice.

453. Did he write after St. Ambrose?—A little after. St. Ambrose converted him.

454. Upon the authority of St. Ambrose there was a contention for that construction previously to St. Augustine writing upon the subject?—That passage stands quite alone in St. Ambrose. It is supposed that the law of Theodosius, forbidding the marriage of first cousins, was upon the suggestion of St. Ambrose, but that is only conjecture.

455. There can be no doubt looking to blood, as the expla-

nation of "kin," that cousins are near of kin?—What would be "nearness of kin" would be left to be defined afterwards.

456. But, according to the ordinary sense of the word, "kin" rather implies connexion by blood, does not it?—Yes, although in God's word it does contain "affinity" also, and some kinds of incest by affinity are condemned as strongly as those against blood.

457. In that respect it would be difficult to say that first cousins were not "near of kin?"—I suppose it was left to the Church at the time to decide what were included under the general words "near of kin;" and the Christian Church, as it was required to be stricter as to polygamy and divorce, so it interpreted the "prohibited degrees" more strictly than the Jewish. The general law was to forbid what was "near of kin," and then the existing authority at the time determined what "near of kin" was.

458. By the "existing authority at the time," you mean the authority of the Church at the time?—Yes.

459. You consider the date of the Apostolic canons to be ante-Nicene; they are not supposed to be the canons of the Apostles themselves?—No, not now.

460. Will you have the goodness to proceed with your statement of the views held upon this subject in the early Christian Church?—Then, I think, the earliest mention of those later degrees is in the early part of the 6th century, in French Provincial Councils. The prohibition of the marriage with the wife's sister is continued, with other laws of Lev. xviii., and that of first cousin is added in the Council of Epaune (Epaon. A.D. 517, can. 30); Clermont, i. (Arvern. 1, A.D. 535, can. 12); both are quoted in the 2nd Council of Tours (Turon. ii. A.D. 567, c. 21). Both are again prohibited in the 3rd Council of Orleans (Aur. iii. A.D. 538, c. 10). In the canons of the Councils as extant, there is mention of the second cousin also (sobrinamve, sobrinæve). In the last edition of the Decretals (caus. 35, q. 23, n. 8), where a spurious Canon is quoted as of the Council of Agde (Agath. can. 61), it is omitted. The Council of Auxerre (A.D. 578, can. 31),

forbids the marriage also of first cousins, and of those born of them—(second cousins).

A small Spanish Council of eight bishops of Toledo (Tol. ii. A.D. 531, can. 5), requires that no one should seek to be united in marriage with any near of kin "as long as he knows the lineaments of affinity by descent[5]," on the ground of Lev. xviii., and threatens canonical sentence and excommunication for years (annosioris excommunicationis), in proportion to the nearness of the blood by which he shall have been defiled. But it does not specify any degrees.

In the Eastern Church, the Council of Trullo, acknowledged throughout (A.D. 694, can. 54), enlarges the canons of St. Basil, founding them upon Holy Scripture, *i. e.* Lev. xviii. 6. A little earlier, Theodorus, a learned Greek, a native of Tarsus, resident for some time at Rome, and then Archbishop of Canterbury, A.D. 668, gives an account of the then rule of both Eastern and Western Churches, with both of which he was familiar. Bede mentions his "secular and Divine learning" (iv. 1). In his Pœnitentiale (c. 11, p. 12, ed. Pet.) he says, "According to the Greeks, marriage may take place in the 3rd degree (2nd cousins), as it is written in the law; in the 5th according to the Romans; yet they do not dissolve marriage in the 3rd. But the wife of one in the 3rd degree may not be taken after his death. A man is, in marriage, equally united with those of his own blood, and those of the blood of his wife after her death" (*i. e.* equally prohibited from marrying either). It appears from this, that although the degrees prohibited in the Western Church were still being gradually extended, the distinction was preserved between degrees prohibited, or thought to be prohibited, by the Divine law and those of the Church, in that marriage within the former was dissolved, not within the latter. The same distinction is practically made by St. Gregory the Great a little before. He was consulted by St. Augustine of Canterbury, as to the degrees within which marriage might take place, and,

[5] This rule was adopted by Pope Gregory II. (A.D. 726), Ep. ad Bonifac, c. 1, and the Council of Worms (A.D. 868, c. 32).

the English being newly converted, he prohibits the marriage of first cousins, but allows all degrees beyond. He mentions, also, that it was forbidden especially to marry one who had become by marriage "the flesh of the brother."

61. Which do you understand him to be speaking of, the law of God as found in Scripture, or the law of the Church as found in any of its Canons or regulations?—He infers the prohibition of the marriage of cousins from that law, as being "near of kin." He had, in the previous answer, said, that "two brothers might by all means marry two sisters not being akin to them; for nowhere in the sacred Scriptures is there found any thing which can seem to contradict this;" and then in answer to the question, "At what degree of consanguinity may the faithful marry, and may marriage be contracted with step-mothers, or sisters-in-law?" he says (Epist. lib. xi. Indict. iv. Ep. 64, Interr. 6, ed. Ben.), "A certain secular law, made in the Roman State, allows first cousins, the children of a brother and sister, or of two brothers or two sisters, to marry;" but, he says, "we have learned by experience, that the children of such marriages cannot thrive. And the Divine law forbids to reveal the nakedness of those who are 'near of kin.'" "Therefore it is necessary that, in order to marry lawfully, they should be in the third or fourth degree," that is, second or third cousins.

62. The objection taken by St. Gregory to those marriages, inasmuch as the issue of marriages by persons connected by blood do not thrive, is an objection that does not apply to marriages within the prohibited degrees of affinity?—The question was, whether to marry in the 2nd, 3rd, or 4th degree. He was not as yet speaking of the question of affinity; he was speaking of the question of consanguinity: he alleges as the ground for forbidding first cousins to marry, partly this, and partly the general principle of their being near of kin. Then afterwards he goes on to say, "to marry with a step-mother is a grave offence, because it is written in the law, 'Thou shalt not discover thy father's nakedness' (Lev. xviii. 7). For a

son may not reveal a father's nakedness. But since it is written in the law, 'They two shall be one flesh,' whoso shall have presumed to discover the nakedness of a step-mother, who was one flesh with the father, hath thereby discovered his father's nakedness." Then, also, "with a sister-in-law," he says, "it is forbidden, because through her former union she became the brother's flesh." There is throughout no trace of any contrary practice, and the same laws went on through the latter part of the Church; the only question was whether it should be restricted. It became the established custom in the West to prohibit to what was called the 7th degree, but the practice still varied in the 9th century. The prohibition was restricted by the 4th Lateran Council (Can. 50), in the time of Pope Innocent III., A.D. 1216, to the 4th [h].

[h] Mention is made of the 7th generation, in an Epistle of Felix, Bishop of Syracuse, to St. Gregory, inquiring as to the latitude given to the English, and supposing the 7th to have been fixed by the Nicene and other Councils (ap. St. Greg. Epp. d. xiv., Ind. vii., Ep. xvi.), and there is an answer often quoted as St. Gregory's, speaking of the 7th degree as the ordinary rule of the Church (*ib.* Ep. xvii.); but the epistle is given up as spurious by some, and among others by the recent Editor of the Decretals (Ep. supposita, Richter on Caus. 35, q. ii. iii., c. 10), and it is contradicted by the statement of Theodore as to the Roman practice. Marriages up to the 7th degree were prohibited by Pope Gregory III., A.D. 731, ad Bonifac., c. 5, and by Pope Nicholas II., and a Roman Council, c. 11, 12, A.D. 1059. The 1st Council of Mentz, A.D. 813, forbade *thenceforth* marriage in the 4th, 5th, and 6th degree (ut nullus *amplius*, see Caus. xxxv., qu. 2, 3, c. 16, 17, 21. Corp. Jur. canon. ed. Richter). And even a little later, A.D. 847, the celebrated Rabanus Maurus, Bishop of Mentz, writes to another bishop, recommending that marriage be allowed beyond the 4th. He speaks of Lev. xviii. 6, as a Divine law, and as opposed to heathen defilement. "Of marriage, and how consanguinity is to be honoured, the Lord speaketh in Leviticus" (quoting xviii. 6). "For since the Lord wished to separate the people from the defilements of the heathen, He first, by a general command, forbade any one to approach to what was near of kin, to uncover her nakedness; then He subdivided this same generality into twelve species, which, however, do not extend beyond the 3rd or 4th generation." Then having quoted St. Gregory, who allowed the 3rd and 4th, Theodore the 5th, and Isidore the 6th, he recommends Theodore as the mean between Gregory and Isidore, "that marriage be lawful in the 5th, since the Divine law does not contradict this, nor the sayings of the holy fathers prohibit it." (Ep. ad Humbert.)

The decretal attributed to Pope Julius, A.D. 337—352 (Caus. 35, q.

463. Are you aware, whether or not the power of dispensation was exercised from early days with regard to those prohibited marriages?—The earliest notice, of which I am aware, as to individual dispensation of the prohibited degrees, [was between 3rd cousins, William Duke of Normandy, afterwards the Conqueror, and Matilda, both great grandchildren, through the female lines, of Geoffrey Grisegonelle, Duke of Anjou[i]. The next] is one given by Paschalis, A. D. 1103, between Boleslaus, King of Poland, and a daughter of a King of Russia, Sbisleva. (It is mentioned by Baronius, A.D. 1103, § 14, on the authority of Longinus.) They were related in the 4th degree of consanguinity, *i. e.* were 3rd cousins. The next, of which I know, is by Innocent III.[k], to whom Otho, Duke of Saxony and Emperor of Germany, applied for a dispensation to marry the daughter of his rival Philip. There was some consanguinity which is not specified, and which I have not yet ascertained; yet not,

2 et 3, c. 6), alleged by Bellarmine (de Matrim. 1, 29), as evidence for the earlier prohibition to the 7th generation, is now acknowledged to be spurious (see Corp. Jur. can. ed. Richter, ad. loc.); that ascribed to Pope Fabian (A.D. 236—250), restraining marriage to the 4th degree (c. 3) is from the Pœnitentiale of Theodore, in the 7th cent. (c. 11. ed. Pet.); as is another attributed to Pope Julius, prohibiting marriage with widows of those akin to the wife, to the 3rd generation (c. 12). Another decretal, mentioning the 7th generation (c. 16), is from an epistle of Pope Gregory III. ad Bonifac., c. 5 (A.D. 731). Another attributed to a Council of Lyons (*ib.* c. 19) is spurious.

The remaining are from an epistle of Pope Nicholas II., A.D. 1059, and of Pope Alexander II., A.D. 1065 (*ib.* q. 5, c. 1). The later Canons of the Council of Agde (of which c. 61 is quoted *ib.* c. 8) are spurious (see Richter, ad c. 30, 23).

[i] [See L'Art de Vérifier les Dates. Thomassin speaks of one given by Pope Pascal II. to Philip I., King of France, as the first.]

[k] [Christianus Lupus, in his Notes on the Council of Rheims (Synod. General. and Provinc. Decr. et Canones, P. iii. p. 403), mentions another marriage within the prohibited degrees, antecedent to Innocent III. It was no case of dispensation at all. It was between Rainier, Count of Hainault, and the daughter of Count Hermann. The degree is not mentioned; but it could not have been near, since it was defended on the precedent of St. Gregory's permission of marriage already contracted of the 4th or 5th degrees. Gerard, Bishop of Cambray, by the advice of his co-bishops, remained silent unwillingly (Chron. Camerac. iii. 10).]

certainly, so near as first cousins. It is spoken of vaguely as something distant[1]. The Pope gives the dispensation in the hope of healing "the rent in the empire, which threatened not the empire only, but well nigh the whole world with heavy perils." The cause was committed to be examined by the apostolic legates, that if, after inquiring into and ascertaining the truth, "an urgent necessity and evident utility for restoring peace in the empire require such a marriage to be contracted, they, supported by our authority, shall dispense with its being contracted." This ground, "si urgens necessitas et evidens utilitas postulaverit," is repeated in each Epistle. (Registr. Innocent III., de negotio Imp. Ep. 169 and 178, Regi Ottoni, and Ep. 181, Archiepis. et Episc. in Theutonia constitutis, ed. Baluz.)

This was in the 11th year of his Pontificate, A.D. 1209. This form of "urgent necessity or evident utility," seems to have been of a standing form of giving dispensations, showing that they were not given lightly even in remote degrees. It recurs in a dispensation given by Innocent IV. to two persons who had contracted marriage, and discovered afterwards that they were 3rd cousins. The dispensation sets forth, that "the 4th degree of consanguinity or affinity was forbidden by the canons;" yet the Roman Church dispenses where there is "urgens necessitas vel evidens utilitas," and dispensed in this case for fear of grave scandal (Baluz. Miscell. vii. 407). It recurs again in a dispensation in the 3rd degree of affinity, given to Ulric, son of a Duke of Carinthia. In this it is alleged that it "was given to allay deadly enmities, between the parents and vassals." These being degrees prohibited by the Church only, the Church removed the prohibition, for a great gain of peace and love. (Baluz. *ib.* 450.) Dispensations were refused at the same time in nearer degrees, even beyond the Levitical law or the rule of the Primitive Church. Pope Celestine, the pre-

[1] [Otho and Beatrix were 2nd cousins once removed, *i. e.* in the 4th degree of consanguinity; Otho being the great grandson of Henry the Black; Beatrix, the great granddaughter of Henry's daughter, Judith. See L'Art de Vérifier les Dates.]

decessor of Pope Innocent III., excommunicated the King of Portugal, and King and Queen of Leon, and laid both kingdoms under an interdict, because the King of Leon had married his first cousin, a daughter of the King of Portugal, whereupon they separated; and when the same King of Leon married his first cousin once removed, daughter of the King of Castile, Pope Innocent III. excommunicated him, and laid his kingdom under an interdict, exempting only the kingdom of Castile, because the king was willing to take back his daughter. The Pope mentions at the same time that the like petitions had very often been refused and condemned, (temporibus suis repudiatas toties et damnatas petitiones, Innoc. III. Epp. L. ii. Ep. 75, A. D. 1199,) and blames the very presenting of them as offensive. (*ib.*) Alexander III. (A. D. 1159—1181) forbade marriage even with the sister of one espoused (ad c. audientiam de spons.). Another dispensation, by Pope Alexander VI., supplies the evidence, that dispensations even in distant degrees were still very rare [m]. It was given to John, Marquis of Bran-

[m] [Christianus Lupus says of the close of the 10th century: "At that time there was not the easiness as to dispensations of marriage which there now is. No marriages in the 6th or 7th degree of blood or of affinity were then allowed by dispensation even to kings and emperors, even if contracted in ignorance, much less before they were contracted; but all were separated according to the rigour of the ancient canons. So wholly unknown was such a dispensation to the Church then, that a certain Frank, returning from Rome, asserting that such had been given him by Gregory III., and pretending on the strength of it to enter into marriage, very greatly scandalized all France; and Pope Zachary, when consulted by our Apostle Boniface, who would not believe it, answered, 'God forbid that our predecessor should be believed to have directed this. *For neither are such things directed by this apostolic see, which are found contrary to the institutions of the fathers or of the canons.*' He commanded those incestuous to be separated and punished." Lupus adds the instance of Fulbert, Bishop of Cambray, separating Amalric, Count of Hainault, from one whom he had taken near of kin (Balderic, Chron. Camerac, i. 73). Conrad II. was required to promise to give up a marriage with one in the 2nd degree of affinity, as the condition of being elected emperor, though he broke his promise (a dispensation was not thought of) (Glab. Radulph. Hist. Prœm. L. iv.). Pope Alexander II., when applied to, whether a man might retain one near of kin, unlawfully united with him, and compensate it by prayers, fastings, and giving away

denburg, to marry his 2nd cousin, the daughter of the Duke of Saxony. It sets forth that "the Roman see rarely, or never, except for some great utility and necessity, was wont to remove an impediment of this sort by the grant of a dispensation" (ap. Bremond Bullar. Ord. Præd. t. i. p. 282).

If the cases of dispensation between 2nd cousins were rare, it will not be expected that there should be any within the Levitical degrees, and a celebrated epistle of Innocent III., which has been received into the decretals (de restitut. spoliat. cap. *literas*), and has been much commented upon, and alleged as an authority by canonists, while it implies that dispensations had previously been given, assumes that, within the Levitical degrees, or those "prohibited by the Divine law," they neither had *nor could be given.*

The question proposed to Innocent was, "Whether, when [after marriage] any degree of consanguinity is objected, in which the Apostolic see *cannot* dispense, nor hath been wont (*dispensare non poterat* nec etiam con-

of property and alms, answered, "*We can find* (comperimus) *no authority by which we may allow him this*" (Alex. II. Mangiso Venet. Episc. ap. Ivon. Decret. ix. 9). The same writer gives the following account of the commencement and progress of dispensations:—"Innocent III. was about the first who dispensed with impediments of this sort. Who knows not the dreadful wars of Otho IV. and Philip for the German empire? After the death of Philip, Otho's right was clear, but the daughter of Philip was in the way; hence, in order to make a general peace, the princes of the empire and the bishops, nay, the very cardinal legates of the apostolic see, thought good that Otho should marry her: but the 4th degree of consanguinity hindered. Hence at length, at the prayer of the whole clergy and people of the empire, the above pontiff gave a dispensation; yet on the condition that Otho should found two very large monasteries, and that the whole empire should, with large alms and fervent prayers, compensate for this wound to ecclesiastical discipline. So it stands in Arnold, Abbot of Lubeck, in Chrons. Sclav. Otto de Sancto Blasio adds, that the abbots of the Cluniac and Cistercian Orders promised that they would complete that compensation by various pious works of their monks, and took that wound of the canon upon their own consciences, and that Otho was to pledge himself to the defence of all churches, and to undertake the sacred war. A crevice once made is easily enlarged, and at last grows into a large aperture, yea, to a wide-open door."]

suevit), and the proofs are ready and at hand, the restoration [of the wife] is to be allowed or refused?" and it is plain from the next question, that the words *cannot dispense*, are to be taken strictly, for the writer goes on to ask, "Does the same right exist, if any degree, admitting of dispensation (gradus dispensabilis), or any hindrance admitting of dispensation (impedimentum dispensabile), is alleged?" And in this way the ancient gloss on the decretals takes it; for having proposed the solution "non vult vel non expedit," the writer proceeds to enumerate what the Pope cannot dispense with, and adds, "I believe the same of the degrees prohibited by the Divine law, as he speaketh, so then this word *cannot* is put strictly, and that explanation 'non vult vel non expedit' has no place here." (Glossa ad *Literas* de restit. spol. c. 13.) And Pope Innocent himself takes it strictly; for in his answer he omits the "nec etiam consuevit," and takes "*non possit*" only. "With the last opinion (that it was sometimes to be done, sometimes wholly refused) it seemeth to fit in not incongruously, that in the degrees *prohibited by the Divine law*, access [to the wife] be refused, but in those interdicted by human constitution it take place, inasmuch as in the former *a dispensation cannot be given* (in illis dispensari *non possit*); in these last there *is* power to dispense (in his valeat dispensari or dispensare), as St. Gregory and many others have dispensed." The instance of St. Gregory the Great, to which Pope Innocent refers, related not to dispensations, properly so called, but to the dispensing with the laws of the Church in the case of nations newly converted; but it illustrates further what he means by the "Divine law;" since St. Gregory appeals directly to Lev. xviii. The same distinction between the Divine and the Canonical law occurs in St. Thomas Aquinas (A.D. 1255): "Consanguinity, as to some persons, hinders marriage by the law of nature" [he only *instances* parent and child]; as to others, by *Divine law* (de jure Divino); and as to others, by law instituted through men (Suppl. 3, P. q. 54. art. 3, concl.), and "Divine law" he explains to be the Levitical; "jus Divinum, quod in veteri lege

continetur." (*Ib.* Art. 4, n. 7.) But "Divine law," he held the Pope could not dispense with. (For this, see 1, 2, q. 94, 5, 2. q. 97, 3. 1. 4. 3. q. 100, 8 *o.* 2. 2. q. 89. 9. 1.) It appears, too, from Aquinas, that it was held that such dispensations as were given, should be given for some public cause: for he admits the fact, that "dispensations to contract marriages in a prohibited degree are more readily given to the rich and powerful;" but pleads "the dispensation for contracting marriage is wont chiefly to take place to confirm a covenant of peace (propter fœdus pacis firmandum), which is more necessary for the common good, as to eminent (excellentes) persons. And therefore the granting dispensations more readily to them, does not involve the sin of acceptance of persons." (2. 2. q. 63. 2. 2.) And two eminent schoolmen in the two following centuries, Pet. de Palude (A.D. 1330), and Antoninus, Abp. of Florence (A.D. 1444), lay down that dispensations were to be given, not for any secular object, "the increase of patrimony, but peace or concord, or something of this kind" (Pal. d. 40. q. 1 concl. 3. Anton. iii. p. tit. 1, c. 14 fin.), whence dispensations could not be common. From Aquinas downwards, there is a mass of authority that the degrees contained in Leviticus xviii. are part of the Divine law and still binding, and that consequently the Pope could not dispense with it.

464. Was it not upon the authority of Aquinas that Henry VIII. interposed, contending that the dispensation of the Pope was not good in the case of Katharine's marriage? —That seems to have been the universal opinion up to that time. I believe the first dispensation in a degree so near as that given to Henry VIII., was just before it. I find in writers on this subject, two cases only, up to a certain time, again and again referred to[n], in which Popes have dispensed in affinity so near; so that it does not seem too much to infer that there were no more; and these two dispensations were given by two Popes,

[n] As by F. Dom. Soto, in iv. d. 40, q. un. art. 3. Caietan, in 2. 2. q. 154, art. 9. Major de Sacr. Matrim. l. c. Paris. Consil. iv. 68. n. 137. Castro de lege pœnali, i. 12. Sanchez, vii. 66, 11. Bellarm. de Matrim. i. 28.

whose moral and religious character is a note upon their acts. The first was Alexander VI. (de Borgia)°. He gave a dispensation to Emanuel, King of Portugal, to marry the sister of his deceased wife; they were daughters of Ferdinand, King of Spain. The Pope who gave the dispensation for Henry VIII. to marry his brother's widow, another daughter of Ferdinand, was Julius II. Very shortly before that, it was held that the Pope could not dispense in any such cases. That was held by a great many authorities; for instance, St. Thomas Aquinas, St. Buonaventura, and a great body of schoolmen afterwards. Both the schoolmen and the Canonists say that the Pope could not dispense in those cases, because it was against the law of God. I think that one of the strongest passages is by John de Turrecremata, an eminent theologian and canonist, in the confidence of Pope Eugenius, by whom he was sent to the Council of Basle, and was made a Cardinal. In answer to some who alleged that such dispensations had been given, he says, "We have not seen this: nay, on the contrary, when the King of France, now reigning, was Dauphin, he applied that, his wife being dead, he might contract marriage with her sister. The matter was examined before me *(coram nobis)*, by the command of the lord Eugenius, to whom the cause was committed, and it was judged that the Pope could not dispense 'quod non poterat Papa dispensare.'"

55. What is the date of that—what king of France was he speaking of?—I suppose it was Charles VII., but he speaks of it as having been examined before himself. He was himself called to Rome by Eugenius, A.D. 1431. The discussion in which Turrecremata is engaged, is, "Can the Pope dispense in degrees of consanguinity forbidden by the Divine law?" and then he goes on to say, "that supposing it had been sometimes done, or should it be

° Alexander VI. also gave a dispensation, in a near case of consanguinity, to Ferdinand II., King of Sicily, to marry his aunt. It has been pleaded in behalf of this that she was half-blood (Barth. de Spina de Potest. Papæ Tract. Univ. Juris, t. 13). They died childless (L'Art de Vérifier les Dates).

done by any Pope, either ignorant of the Divine law, or blinded by money (excæcatum cupiditate pecuniarum), which is wont to be offered for such irregular dispensations, (exorbitantes, "out of all rule," I suppose,) "or supposing it to have been done to please men, it does not follow that he could do it rightly" (non sequitur quod potuerat juste facere). Then he says, "the Church is ruled by laws and rights (juribus, legibus), not by such acts or examples," so that he would say, that even if a corrupt Pope had dispensed with it in any case, that was no precedent for the Church.

466. Can you give a reference to that passage which you have been quoting?—It is in the Decreta, Pars ii. Causa 35, q. 2, under the head Conjunctiones. The authorities much more at length are given by Sanchez, (L. vii. de impedim. matrim. Disp. 52, § 5,) he gives references to both schoolmen and canonists at great length. They all go upon that ground, that Leviticus xviii. was the Divine law. You will find also that it is said, that Leviticus xviii. applies to 12 cases, and among those is "the wife's sister." The list is comprised in four memorial lines [p].

467. What was the decision of the Pope in those cases in which the argument was addressed to him?—Ordinarily speaking, I suppose only those cases would be known in which the dispensation was given. Turrecremata speaks of one which was refused, and implies that many applications were made. But I was speaking of the question, as discussed in the abstract by the schoolmen and canonists. They put the question "Can the Pope dispense in degrees of consanguinity?" in order themselves to answer it. And they who follow St. Thomas Aquinas divide the prohibited degrees into what are prohibited by —1. The law of nature, as of parents and children. 2. The Divine law, *i. e.* the degrees prohibited by Lev. xviii. 3. Positive, *i. e.* the Canon law. And they say that the Pope cannot dispense in the two first, "because it would

[p] Nata, soror, neptis, matertera, fratris et uxor,
Et patrui conjunx, mater, privigna, noverca,
Uxorisque soror, privigni nata, nurusque,
Atque soror patris, conjungi lege vetantur.

be to dispense with a law not his own, but Another's, Who expressly forbids it" (P. P. Parisius, t. iv. Cons. lxviii. § 38); but that he may dispense in the 3rd (Ecclesiastical Law). In a word, that the law of God, natural or positive, God Himself alone can dispense with; but the Pope, as the head of the Church, may dispense with the law of the Church.

468. Was the contrary maintained by the others, that those marriages were not within the Levitical law, or that the Levitical law did not apply to the existing state of things?—There was no doubt whether the degrees were forbidden; the only question was, whether the authority of the Church replaced the Levitical law, or whether it was binding as being moral.

469. Under the new law?—Yes. Scotus (in iv. disp. 40, q. un. n. 5), A.D. 1301 regards all prohibitions, except that of the direct ascending and descending line, parent, child, grandchild, &c., to be no part of the law of nature, but of the Church only. He says, "But whence is it, that such or such a nearness of kin, in itself hinders? I answer, in the evangelic law there is not found any prohibition by Christ beyond the prohibition of the law of nature; nor did He explicitly confirm the prohibition made hereon in the Mosaic law; but the Church made persons unlawful, at one time in a remoter degree, afterwards in the 4th." He is followed by Joh. Bassolis, A.D. 1322; Thom. de Argentina, A.D. 1345; Gul. de Rubeon, A.D. 1354; Wend. Stambach, who wrote a supplement to Gab. Biel, and P. Tataretus (A.D. 1509) Disp. xl. q. un. He seems to be in part followed by Joh. Major (A.D. 1529), but that he regards all the Levitical degrees as part of the law of nature. "Of *all* affinity," Scotus says, "there is no reason, except the statute of the Church, making connections unlawful." (Disp. lxi. q. 1.) But the great body of the authorities speak of Lev. xviii. as the Divine law.

470. Was it not the general understanding of the Church in early times, that the chapter of Leviticus adverted to was a part of the moral law, which was binding upon Christians, and not part of the ceremonial law, which was

done away with at the coming of our Saviour?—Yes, by those who quoted it.

471. That was the general impression of the Church?—Yes; of such authorities as I have referred to, St. Basil, St. Ambrose, St. Augustine, and St. Gregory.

And in later times, also, it is brought forward (as in the Decretals) as the ground why these marriages are prohibited by Divine law. Thus Pope Zachary (A.D. 745) writes to a Bishop, "Thou knowest well, holy brother, that the Lord commanded by Moses" (quoting Lev. xviii. 7—9). "Since then *we* are commanded *(jubemur)* to abstain from those near of kin to us" (as binding on us now), Ep. ad Theod. Episc. Ticin. (*vide* Decret., Pars ii. Caus. 30, q. 3, c. 2); and Pope Innocent III., in three epistles, expresses or implies the same. They are all quoted in the Decretals. In the one he speaks of "the degrees prohibited by Divine law;" and again, "of consanguinity, *especially* in the degrees which the Divine law has prohibited," *i. e.* as distinct from, and yet more sacred than the canonical (de restit. spol. cap. Literas), where the authorized gloss also explains the Divine law to be Lev. xviii. And again he gives answer, that "infidels converted to the faith, if married according to the enactments of the ancient law, or their own traditions as to degrees of consanguinity, were not to be separated;" implying that within those degrees they would be to be separated; but that they were not to be separated in degrees prohibited by the canonical law only (de consang. et aff. cap. de infidel.); and this is borne out by another, in which he says, that "pagans married in the 2nd or 3rd, or any further degree," were so to remain, on the ground that "*in the above-mentioned degrees* the pagans had contracted marriage lawfully as to them, not being bound by the canonical constitutions;" implying, again, that in the degrees of the Levitical law they would be bound, although not by the law of the Church, to which they did not belong (de divort. tit. Gaudemus). And in the next cap. he allows that the recent Livonian converts, on account of the newness and weakness of that nation, should continue the marriages contracted with the

relicts of their brothers; but "only if (si tamen), their brothers deceasing without children, they had married such to raise up seed unto the departed, according to the law of Moses," "forbidding all such marriages for the future:" so that he holds that, even in an infidel coming to the faith, no marriage can be valid, prohibited by the Levitical law. In all these cases, that law is his rule.

Of Councils, after St. Augustine, these marriages are, among others, punished with excommunication by the Council of Clermont (Arvern. i., A.D. 535, can. 12), as being opposed "to the authority of the Divine law and the law of nature;" by the 3rd Council of Orleans (Aurel. iii. A.D. 538, can. 10), with reference to Deut. xxvii.; by the 2nd Council of Tours (Turon. ii., A.D. 567, c. 21), which incorporates the whole section of Lev. xviii. and Deut. xxvii., relating to these marriages. This canon is supposed to have been renewed in reference to King Charibert, who had married two sisters, and, refusing to obey, was excommunicated, and with his wife died soon afterwards. (Greg. Tur. Hist. Franc. iv. 26.) The Council of Trullo (Quini-sext.), A.D. 692, can. 54, enlarges the canons of St. Basil, founding the prohibition upon Holy Scripture, *i. e.* Lev. xviii.

And of the schoolmen, St. Thomas Aquinas, A. D. 1255, says (dist. 39, art. 3, ad 3);—"Infidels, being unbaptized, are not bound by the Church, but are bound by the statutes of Divine law *(juris Divini)*, and, therefore, if any infidels should have married within the degrees prohibited according to the Divine law, Lev. xviii., if either or both be converted to the faith, they cannot continue in such marriage; but if they have married within degrees prohibited by the Church, they may abide together, if both be converted; or if, one being converted, there be hope of the conversion of the other" (dist. 39, art. 3, ad 3, and suppl. 3, p. q. 59, art. 3, ad 4). *St. Buonaventura*, in answer to the question, "Whether the marriage of infidels coming to the faith be, on account of unlawfulness in the parties, dissolved," distinguishes between what is "unlawful according to nature and Divine institution —as in the degrees prohibited by the Divine law (as the

Canonists say), when the 2nd degree is prohibited; and this unlawfulness binds both the faithful and infidels;" but that unlawfulness by the constitution of the Church, such as are persons within the 4th degree, does not bind infidels, nor hinder marriage from being contracted, nor dissolve it being made (iv. dist. 39, art. 2, q. 4). At the beginning of the same century, *Antissiod.* (William, Bishop of Auxerre), A.D. 1200, meets the objection that "the positive law of the Church forbids certain persons to marry, whom the Divine law allows; for that in Leviticus only 12 persons are forbidden in marriage, and among those are not those in the 2nd degree." In his answer he admits, "We say, then, that that in Leviticus is moral by nature *(morale naturæ)*," and argues that, "atlhough what is such, is unchangeable in its essence, it may vary in effect, and so that as in the old law more were prohibited from marriage than before it, so again, more under the new than under the old." He assumes it to be unchangeable, only justifying the extension of the principle beyond the letter of the Divine law (in iv. sent. tr. 9, q. 7). *Albertus Magnus* (A.D. 1260) speaks of the law of the Church as superadded to the prohibitions by God, in Lev. xx. and Lev. xviii. 8, as the ground of the law of affinity (in iv. 40, 8. 41, 7). *Richard de Media Villa* (A.D. 1290), a learned Englishman, of great weight, says, "By the dictate of the *Divine law*, those of kin are forbidden to unite in marriage in the 1st degree, and the 2nd in part, as appears from Leviticus xviii.; by the statute of the Church, they are forbidden in the 3rd and 4th degree also" (D. 40, art. 1, q. 2); "affinity hinders marriage in some degrees by Divine law; for the Divine law forbids, as it is in Lev. xviii., the son to marry his father's wife, &c.; in some degrees, by positive law" (D. 41, art. 2, q. 1, concl.). *F. Maronius* (also praised as Doctor Illuminatus et Acutus), A.D. 1315, says, that "in the time of the primitive Church, it was as in the time of the written law; now, four other degrees are forbidden by positive law, which then was not formed." *Durandus a S. Porciano* (entitled Doctor Resolutissimus), A.D. 1320, says, "Consanguinity, according to the ascending and

descending line, hinders marriage as to every degree by the law of nature. But consanguinity, according to the collateral line, hinders marriage by the Divine law *(de jure Divino)* in the first degree, between brother and sister, and the rest of the 1st degree, as appears from Lev. xviii.; but by the positive law *(de jure positivo)* to the 4th degree inclusive" (in iv. dist. 40, q. 1, 9. He argues in the same way as to affinity, dist. 41, q. 1). Hence, he also infers that infidels, married within the degrees prohibited by the Church, are, on their conversion, not to be separated, because not bound by them: but if it were in a degree *forbidden by Divine law, or the law of nature, since those bind all*, they are to be separated (dist. 39, q. 2, 20). *Pet. de Palude*, A.D. 1330, says (d. 40, q. 1, con. 3), "In the degrees prohibited by the law of nature or the Divine law, God alone can dispense, or he whom He has inspired, yet we do not read that He dispensed with any. But the Pope can dispense with those degrees which are of positive law, as in the 4th, or 3rd, or 2nd, of those collateral and in the same degree, as when brothers' children marry, which is allowed by the civil law and that of Moses. It is questioned whether the Pope can dispense in a degree forbidden by the law of God, not by that of nature. And *if, indeed, the prohibition* of the law of Moses were purely judicial, not moral, it would not bind us, except as far as it is renewed by the canon law, and so the Pope might dispense in all those degrees, but I may say all the degrees *(fere omnes gradus)* prohibited by the Mosaic law are also prohibited by the law of nature, whence it is more probable that the Pope cannot dispense in them." *Joh. Bacon* (A.D. 1329), entitled "Doctor Resolutus," taught that the Pope cannot dispense in the degrees prohibited by the Divine law (Lev. xviii.), nor were heathen converts to be separated who had married in any lower degrees (in iv. d. 38, q. 2. et 4). Cave (Hist. Lit. sub. nom.) says, "That he had held the Pope could dispense with the Divine degrees, until taught at Rome." *Pet. Aureolus* (A.D. 1321), *Doctor Facundus*, divides the prohibitions under Natural, Divine, and Positive law only, which last he explains to be the

law of the Church alone (dist. 40, q. un.). *Thomas Waldensis* (A.D. 1409), de Sacram., answers the objection, "Perchance one will say, 'that these are Jewish observances of the ancient law now done away, therefore they are not to be heeded in the law of liberty.' To this Ambrose was opposed, when he said, 'But I assert that it is prohibited,' speaking of that which is prohibited there, not in itself, but à fortiori. St. Augustine also, &c., 'Add to this, that at the beginning of those prohibitions, he calls them not ceremonies, but precepts; and at the close, laws and judgments.' But if the table of prohibitions there be weighed thoughtfully, according to the expositions of those Fathers, it furnishes a full foundation for the separations and unions fixed by the Church, to the 4th degree. Thus, then, it appears from Ambrose, that *this law binds us as to its substance, just as it did the Jews;* for thus it is something moral, and belongs to the ten commandments, *although it was purely judicial as to its punishments. Antoninus*, Archbishop of Florence (A.D. 1444), uses the words of P. de Palude. *St. Dionysius Carthus.* (A.D. 1450), follows Aquinas as to the division of the impediments into Natural, Divine, Canonical, and the legality of heathen marriages (when these were converted), if contracted within the Canonical, but not within the degrees of the Divine, law (ad iv. 39 et 40). Of commentators, Dominicus Tolosanus (quoted by Barth. de Spina, de pot. pap. § 87), and Cardinal Hugo may be named. The latter says, at the beginning of Lev. xviii., "Thus far the Lord instructed His people in things having a shadow of the faith and of life, not the truth; but here He instructs it in moral things, recalling it from evil."

472. Then the binding power in that chapter in Leviticus as part of the Divine law being admitted, the next question was the question of construction?—Yes.

473. Upon that subject was it not true that in the early days of Christianity, as far as you have been able to trace, according to the best evidence you can find, they held that the marriage of a man with his wife's sister was prohibited by that law?—Yes.

474. Are the Commissioners also to understand that the

Pope did not pretend at any time to dispense with the Divine law at that period?—Yes. The older Popes were very careful to guide themselves by that law, as appeared in St. Gregory's answer to St. Augustine of Canterbury. But as some of the canonists (as Turrecremata) themselves observe, some of their acts were mistaken, and thence it was supposed that Popes had dispensed with the Divine law, and it was maintained by some that they could. (Turrecremata speaks very severely of certain "Doctorculi," who, "without any solid foundation, wish by flattery to equal them [the Popes] as it were to God," adulando eos quasi æquiparare Deo.) The cases (as has been observed by Estius, iv. d. 41, § 3,) were "not so much dispensations, as declarations of the validity of such marriages contracted by persons as infidels." The expressions misunderstood were, that Innocent III. allowed marriage to continue in the 2nd degree (tit. Gaudemus *de divort.* 4, 19, 8), and so it was inferred that Innocent allowed not merely the marriage of first cousins, which is allowed by Lev. xviii., but the same degree unequally, and so including the nephew and aunt, which was forbidden. The answer was (and this is stated to be "the common judgment of the canonists," Barthol. de Spina Jur. univ. Tract. T. 13), that Innocent includes first cousins only, as in the *c. de infidelibus* de consanguin. et affin. (4, 14, 4), he expressly requires that the marriages should have been according to the institutions of the Divine law. And so the gloss says, "the whole 2nd degree is not forbidden by the Divine law." In like way, with regard to the permission given to the Livonians who had married their brothers' widows to raise up seed to their brother, this was but to allow them to retain, after their conversion, wives whom they had married according to the law before conversion. Whereas, the prohibition to marry such after conversion shows that the Pope felt he might not even revive an exception under the law when it had been done away.

The case of dispensation by Pope ~~Urban~~ Martin V. (A.D. 1417 ~~1362—1370~~), although approaching to the Levitical law, still comes under the Canon law, since it related not to

affinity by marriage, but to illicit intercourse. St. Antoninus, Archbishop of Florence, who is the authority for the fact, expresses his anxiety that it should not become a precedent. He relates (Summ. 3, p. tit. i. c. xi.) that Pope ~~Urban~~ "did dispense, but with great difficulty, both because the matter was secret, and the man unfit for a religious life, or to go to a distance, so that there would have been scandal from the divorce, had it taken place. The Pope first appointed several Canonists and Theologians to confer hereon *whether he could dispense*, nor did they agree in the conclusion, but some said that he could, some affirmed the contrary. But since what is certain is to be retained, what is uncertain to be left (and it is a sort of sacrilege to dispute as to the power of Princes, especially the Pope, according to that, Caus. xvii. q. 4, c. 30, 'No one is permitted to judge of the judgment of the Apostolic See, or to review its decision,' &c.), therefore no one must be advised, but on the contrary, must be forbidden to procure a dispensation, even from a Pope, to contract marriage with one whose mother or sister he has known carnally; but if after contracting, and much more, completing such marriage, he hath obtained a dispensation to remain with her, the matter must be left to the judgment of God and not be condemned."

475. And the question which arose when the dispensation was sought for at his hands, independently of whether it was expedient to grant it or not, was whether or not the marriage sought to be dispensed with was contrary to the Divine law?—The schoolmen generally say that he could not dispense with it *because* it was a Divine law; and, as I mentioned before, Turrecremata said that even if the Pope did what was wrong, and so dispensed, it would not be valid—in fact, it would be like any other sin—the dispensation would not be a precedent. As another instance, P. P. Parisius, a very eminent Canonist (referred to by Sanchez), after maintaining (T. iv. Consil. lxviii.) that the Levitical degrees are *de jure Divino* (§ 1), that the first degree of affinity, as well as of consanguinity, makes an impediment *de jure Divino* (§ 13), and that a man is forbidden to marry a brother's widow, being a sort

of sister (§ 15), and that the Pope cannot dispense in such case (§ 38), says, that a Pope must not be obeyed in such a matter (§ 50), that an act so indecent must be considered as impossible (§ 54); and that the person so dispensed with does not remain safe nor secure, since the dispensation is null, and does not take away the sin.

Then, in answer to the actual cases of Alexander VI. and Julius II. he says, "And the examples above adduced, in which it appears that the Supreme Pontiffs have dispensed in the 2nd degree unevenly, and in the first transversely, by no means prove necessarily that the same is to be done in other like cases, since we must not judge by examples, but after the laws. Nor need all things done by predecessors be done by those who succeed them, for many things have been done by Pontiffs which ought not of right to be done" (§§ 251, 252).

476. That is, that supposing it were prohibited by the Divine law, although the Pope had in a few instances granted a dispensation, they would not bind the Church as precedents?—Yes, assuming it to be against the Divine law, it could not bind the Church.

477. Are you aware that the Church of Rome continues to grant dispensations, allowing marriages between men and the sisters of their deceased wives?—I do not know what is the actual practice of the Church of Rome. I should have supposed that it did very rarely, if at all. For the Council of Trent is altogether silent as to the 1st degree, whether of consanguinity or affinity. It says of all the degrees, "In contracting marriages let either no dispensation be given, or let it be granted rarely, and that for an adequate cause (*ex causâ*) and gratuitously." And then of the 2nd it says, "Let a dispensation never be given in the 2nd degree, except between great princes, and for a public cause (Sess. xxiv. de reform. matrim. c. 5). Estius, who died A.D. 1613, added but one instance of this sort of dispensation to the two before mentioned. It was by Clement VII. to a governor of some West Indian provinces, to marry the sister of his deceased wife (in iv. d. 41. § 3, fin.). I observed, in looking over some Consilia, cases of application for marriage within the prohibited

degrees. They were refused as being applied for on inadequate grounds. It appears that in practice also they make a distinction between the 3rd and 4th degree and the 2nd, and that nothing but extreme cases, or as it would seem, I think, *publicæ causæ*, are allowed as grounds of dispensation within the 2nd degree.

478. The rule of the Council of Trent appears then to be a rule of policy?—Or rather a rule not absolute, nor wholly immutable, but one which, in certain very rare cases, may give way for the sake of a greater good than such marriages are by them also reputed to be an evil. As to the 1st degree the Council is altogether silent; and since it says as to the 2nd that in it dispensations are to be given only in very rare cases, it implies that in the 1st none should be given. But the 2nd degree, in the unequal line, contains cases actually or virtually forbidden by Lev. xviii., the marriage with an aunt or a niece. Even of this, the Council does not say anything explicitly, for the 2nd degree is partly allowed by the Levitical law. But in its Canon iii. it does claim for the Church the power to dispense with some of the Levitical degrees; and the brother's wife was doubtless in their mind, because it had been the subject of the recent quarrel.

479. Do you or not consider that the Council of Trent, by allowing that it could be done at all, though it says that it should be done only in rare cases, consider it as a thing that may be done consistently with the Law of God, and consequently that these marriages are not prohibited by the Law of God?—Not, I conceive, upon their own principles, upon which alone we must consider the dispensations which *they* allow. We must not take the bare fact of their allowing such marriages by dispensation, in certain rare cases, apart from the principles upon which in these insulated cases they allow them. The prohibition of these marriages is not a question of expediency with *them*. They consider them intrinsically wrong, unless there be something in the particular case to change their character. Thus Sanchez says, "taken nakedly, they contain a fault in themselves,"—"nude sumpta, culpam in se continent,"—"unless," by virtue of something out

of themselves, "by some just reason, they are *made* seemly" (cohonestantur, l. c. p. 190). And the judgment which interferes and which declares in a given case, and for very constraining grounds, *that* to be right, which in itself and nakedly considered was wrong, is according to them, not of men but of God. I should have thought that the whole question turned upon the infallibility of the Pope. The Council of Trent anathematizes those who "deny" (not that the Pope, but) "that the Church may dispense with some of them" [the Levitical degrees]; *i. e.* I suppose it identifies the acts of the Pope, when he gives dispensations rightly, with the Church in whose name he acts. And I conclude that they regard him as, in this, so guided by God, and having the mind of God, that in this individual case he judges no otherwise than Almighty God would or does by him. And then it would be no precedent, in their judgment, as to any other case, any more than the sacrifice of Isaac would be for private acts of individuals, or any other case in which Almighty God might be pleased, by Himself, to dispense with His own laws. This, I suppose, to be the meaning of those who deny the power of the Pope to *dispense* with the Divine law, and yet admit that he may in a particular case *explain* it, so that it should not apply to that particular case. Thus Parisius (l. c. n. 350) says, "And as to that which is said, that in these cases a dispensation can be given 'for an adequate cause,' it is answered, 'but in a particular case,' taking the word 'dispensation' largely, as a declaration and interpretation, because this takes place according to the Divine will, which is declared in this particular case to cease, and that His ground does not touch upon this case." "It is different in a true and strict dispensation, as it is a relaxation of the law, for this ceases in those things which are of morals. Or, holding the opinion of others, let us say that in a particular case, a dispensation may be given and a relaxation take place *out of an adequate cause*, when there is a public and common benefit, *not private.* Also, when there is a necessity and a cause taking away sin and not bringing it, or when a greater evil is avoided, or a greater good

gained; and when this cause having its full force in a particular case, the reason of the prohibition of the Divine law ceases, and His will, as they themselves confess, and was inferred above;" *i. e.* if I understand these writers rightly, they believe that God, in such particular case, so guides the Pope, that he declares rightly that in this case, *per se*, the ground of the prohibition ceases. And this may the more be illustrated by the comparison which controversial writers (as Bellarmine) make with the cases of the Patriarchs, to whom God for special purposes allowed what *now* would be against the moral law, as polygamy (in which instance, indeed, the Pope is held to have no power, our Lord having *expressly* done away with it). And this seems the more illustrated by the great stress laid upon the words "ex causâ." It is not a mere question whether such a marriage may take place rarely, but whether in each particular case there be some circumstances which change the nature of the act. There are many Consilia extant of eminent Canonists who were consulted whether a given case were one which fell within the principle upon which a dispensation could be given. I will instance one by De Gozadinis (referred to by Sanchez), which enters into much detail, and illustrates the principles upon which dispensations were given or refused. (It is his Consil. 51, n. 34, sqq.) He first lays down and adduces authorities that the Pope cannot dispense against the Divine law. And, he says, "that there are three sorts of dispensations—first, a dispensation, abrogative or corrective; (this, he says, is not given to the Pope, because Divine law is unchangeable;) second, declarative or expository of the law (and this is allowed to the Pope); third, a relaxation of the law, and this is, properly speaking, a dispensation; and this, either by way of law generally, or with respect to some particular person." Then, with regard to the law which is the object of dispensation, he divides the Mosaic into—1, "ceremonial precepts, which are deadly and death-bringing" (being abolished by Christ); 2, "judicial, which are dead, but may be revived by the Church," if it see good to re-enact them; 3, "moral; and these endure, being unchangeable."

And "moral, are those precepts which have reference to good morals," of which sort are these rules as to marriage. Then, having given eminent authorities among the Canonists, as Abbas [Lapus], Peter de Ancharia, Peter de Palude (whom he entitles a great Canonist and Theologian), Antonius de Rosellis, Joann. de Turrecremata, that "the Pope cannot dispense as to Divine law;" and especially more at length from de Palude, "that marriage in the first degree is hindered by Divine law and that of nature, and that in the first transverse degree the Pope cannot dispense, because in a manner against nature, as with a brother's wife, which was dispensed by Divine law, not by man;" he "puts and presupposes" for the time, that "the other opinion is true, that the Pope can dispense in degrees prohibited by the Divine law;" it must still be added, "*if there be a cause.*" He then adduces the saying of Abbas (on 4. 17. 13), "You must observe this last continually, that it is not *proved* anywhere expressly that the Pope can dispense *for a cause* in the degrees prohibited by the Divine law;" and so he himself says, "that it is not *proved*, that even *for a cause* a dispensation can be given." Afterwards he (Abbas) subjoins, "I have heard that, at the instance of a great prince, a dispensation was given, but I suppose that such a dispensation cannot be, except for a very great and difficult (ardua) cause." The same Abbas, in c. fin. de divort. (iv. 19 ult.), says, "Not that the Pope can for a very great cause (maxima) dispense against the New Testament" [*i. e.* in allowing those who, according to the Old Testament, had married their brothers' widows to raise up seed to their brother, which permission ceased in the New Testament]. The same Abbas (in c. significasti de elect. i. 6, 4) says, that *without a cause* he doth not dispense against the Divine law, and in c. *cum in cunctis* de elect. (1. 6. 7), he says, "that where the Pope dispenses without a cause, it is not a dispensation, but a dissipation;" and again, "where a dispensation is given by the Pope against the Divine law, he who hath the dispensation is not safe towards God; yea, and even if against positive law he dispenseth without cause, he sinneth, although the dispensation availeth

to them in the court below;" and "that a dispensation must not be for a private ground, but a public;" that in positive [or canon] law also a *cause* is required for dispensation, else the person dispensed with "is not safe towards God;" and he quotes Ant. de Rosellis, in Tract. de Potest. Pap. et Imperat. "If the Pope dispenses without a cause, or a sufficiently lawful cause, against Divine law, as that a theft be committed, or one marry in the prohibited degrees, then they with whom he dispenses are bound not to observe it, and may be judges of their own conscience, for whoso doth against the Divine law sins mortally."

Then De Gozadin. gives instances of reasonable cause, "fear of war, present or future, or benefit to the faith, lest any lean to the infidels, or in the case of new converts;" and he gives a specimen of the tenor of Apostolic letters, setting forth "the intense desire of the Pope to see peace and concord flourish among all people, especially Catholic princes," and says that the Pope must give it of his own free motion, not out of importunity; and "that, 'for the sake of peace,' meant, 'the restoration of concord after enmity.'"

The object which De Gozadinis has in this is, to inculcate the great solemnity of dispensations; that the very slightest, those against Canon law, were not to be trifled with; that those against the Divine or Levitical law involved great peril; that they were, in the mind of very grave authorities, wholly illegal; that even supposing such to be possible, it still required some very grave and arduous reason; that, otherwise, it would involve both the Pope who granted, and the person who applied for it, in sin; and although valid in the court below, would not stand before God. And with this corresponds that of Parisius, who quotes authorities for the opinion that the Pope shall not be obeyed in such a matter (n. 50): that an act so indecent in him must be considered morally impossible (n. 54); and that the person so dispensed "doth not remain safe, since the dispensation is null, and doth not take away sin" (n. 57).

The Canonists then seem to have held dispensations

against the Levitical degrees to have been illegal, as being against the Divine law. If pressed by the alleged or real authority of a Pope, they either cast it aside, as Turrecremata, Parisius, De Gozadinis, &c., or as Barth. de Spinis, explain the cases away; or, as Abbas or Joh. Andreas (A.D. 1330), presuppose that there is some very grave case which may alter the act in the sight of God.

As far then as I can judge as to a system in which I do not live, I should have inferred that those who excuse these dispensations against the Divine law, only mean thereby that some other law came in, which took this particular case out of the general rule, and this they admitted out of respect for the authority of the Pope, God (as they supposed) by him declaring the evil to be effaced by some greater good.

And with this it agrees, that Roman Catholic divines distribute things prohibited by law into three classes:— "1. Things so intrinsically bad that they must always and among all be bad, nor can by any change of circumstances become good, as to lie, commit adultery, hate God, &c., and these have properly the force of a law, and are wholly indispensable; 2. Things always and among all evil, *except in extreme necessity*, as to take what does not belong to you, against the will of the owner; marriage with a sister, as at the beginning of the world; 3. Things evil, if taken nakedly and absolutely, which yet, the circumstances being changed, may in various ways be *made* of good repute (honestari), and become good; as to kill a man; for homicide, absolutely and nakedly taken, conveys to all the thought of ill, and so it stands in the Decalogue, 'Thou shalt not kill;' yet if various circumstances are added, as that it be done by public authority, for a common good, to one hurtful to the commonweal, it is no longer evil; and therefore in the same law of Moses men are often commanded to be killed, as adulterers, murderers, &c." (Bellarm. de Matrim. i. 27.)

Modern Roman Catholic divines place in this last class those marriages prohibited by Lev. xviii., for which a dispensation is ever given; and they are, I imagine, very few indeed, to judge from the language of the

Council of Trent. And I suppose it would express their belief to say that they were acts wrong to be done, in their ordinary character, and very displeasing to God, unless He Himself (as they believe), under altered circumstances, Himself by His Vicar upon earth, allow them to be done. Any one who engages in them of his own mind is excommunicated, or cut off from the body of Christ; and they cannot account that a light offence, or "consistent with the law of God," which they visit so heavily. But although they speak as much as they can against those acts being drawn into precedents, there does seem a difference of tone before and since the Council of Trent. They could not now use the stronger language of S. Basil, or of the older Councils, or the Schoolmen, or the Canonists, about them. Parisius wrote after the dispensation of Julius II. which he condemns: and certainly the grounds of that dispensation to Henry VII. for his son, fall very far short of those of which the Canonists admit. Up to the time of the quarrel with England, the great body of authorities had identified the Divine with the Levitical law, and distinguished prohibited marriages into those forbidden by the law of nature, the Divine law, and the law of the Church. Later writers drop this second, and with it all mention of a "positive" law of God, which, as a law of God, stamps a certain moral character upon the acts upon which it pronounces, and they contend that there is no Divine law now, except as to one degree, and that written in men's consciences, the law of nature. They speak of the "Lex Divina naturalis" as one only, and explain of this passages in older authorities, where they speak of the Lex Divina, *i. e.* that given in Lev. xviii. Thus, whereas Pope Innocent III. speaks of "the degrees prohibited by the Divine law," and was so understood by the ancient gloss, Dominicus Soto, a divine of the Council of Trent, restrains this to the "Lex Divina naturalis," prohibiting the first degree only (Dist. 40, qu. un. art. 5). And this very considerable change was made under a bias. The acts of the Popes (or, as the Council and modern writers speak, "the Church," whereas hitherto they had been acts of the

Popes only and those with whom they advised) were to be justified. Moderns argue that these marriages are not against the law of God, because the Pope could not have dispensed with those prohibitions if they had been against the law of God, and consequently that they are not. At least that is always mentioned as one ground that they are not against the law of God in nature (Divinum naturale), because the Pope has dispensed with them; as, on the other hand, it is alleged as a very strong ground for supposing that other marriages are against that law, that the Pope never has dispensed with them.

80. Does the Council of Trent put it upon that ground?—The Council of Trent does not give any grounds. It says in the preface to the Decree, "that ungodly men of this world, in their madness, have not only held amiss as to this venerable Sacrament, but, as their wont is, under pretext of the Gospel, using liberty for an occasion of the flesh, have by word and writing asserted many things alien from the mind of the Catholic Church, and from the approved custom since the time of the Apostles;" and then, in its Decree on this subject, anathematizes those who affirm, that those degrees only of consanguinity and affinity, which are expressed by Leviticus, can hinder marriage from being contracted, and dissolve it when contracted, or *that the Church may not dispense with some of them*, nor ordain that more (than these) should hinder and dissolve marriage."—Sess. xxiv. The Commissioners will observe at once that there will be the greatest difference between such marriages being declared allowable to all, and their being allowed in particular and very rare cases by dispensation, which can be restricted, and which is chosen as the less of two evils. It would be very sad to take the same acts of a Church as an authority on the side of relaxation, and to neglect them as to the restrictions whereby they guard them against wide and indiscriminate abuse. The modern writers admit that there is *turpitudo aliquis* in such marriages, but that there may be certain *publicæ causæ* by which such *turpitudo* may be effaced. But they say very

strongly that there is *turpitudo quædam naturalis* in marriages within the prohibited degrees.

481. Who say that? — Modern writers, since they have given up the question of such marriages being against the Divine law. They say that there is still *turpitudo quædam naturalis*, for which God prohibited it under the Old Testament, and for which the Church prohibits it under the New; but that there may be certain *publicæ causæ*, which might make it expedient in particular cases. Thus Estius says (in iv. d. 40. s. 4), "Although the union of those akin, in whatever degree, if considered nakedly, *is deformed and bad*, and accordingly in a manner prohibited by the law of nature, in which sense it may be conceded that all the commands of Leviticus concerning degrees of kin are natural (as Buonaventura, Richard a Media Villa, de Palude, and others concede), yet it must not be *absolutely* said, that every union of this sort is prohibited by the law of nature;" and Stambach, suppl. ad Biel. 41, q. 1, "The marriage of those akin, although it doth not wholly go against all the goods of marriage, [since God allows some of the ends of marriage to follow,] does go exceedingly against the propriety (honestati) of marriage, in harmony with the ancient Divine law." And Sanchez (L. vii. de imped. matrim. Disp. 52, n. 7), that marriages within the degrees, Lev. xviii., "although not opposed to the natural primæval law, which renders marriage null, are yet opposed to the secondary natural law, inasmuch as, considered nakedly and in themselves, and entered upon at the free will of private persons, without peculiar circumstances giving them a good character, they have in them a certain natural unbefittingness. For nature dictates that a certain reverence should be shown to those akin within those degrees with which the copula conjugalis is at variance. Wherefore the Gentiles sinned, contracting those marriages indifferently and indiscriminately, and without adequate cause." And Soto (in iv. 41, q. 1, art. 3), "Marriage between a brother and brother's widow, and a wife's sister and her husband, although it have on its face, by the law of nature, a certain turpi-

tude and foulness, yet is it not to such degree forbidden by that law, that, shutting out all ecclesiastical law, it becomes by that same law of nature null. What, then, our conclusion asserts is, that marriage within the first degree of affinity is, by the law of nature, foul and unseemly in this third kind. For that in itself it is foul, if considered nakedly, without any other cause to make it seemly, those words of the law show;—namely, in that in all the prohibitions it is said, 'The nakedness of thy father and of thy mother thou shalt not discover;' and it is subjoined in the same way, 'The nakedness of thy brother's wife thou shalt not discover.' The light of nature itself then makes the foulness in marriages of this sort stream on the eyes. And for that, among other causes, both God of old, and the Church now, have forbidden marriages of this sort." And for the grounds of dispensation he says, "Public causes may concur, which may wash off that natural foulness, and make such marriage seemly, as, if it were to take place in order to make peace between princes, or for any other public cause; for, for others of lighter moment it were *not seemly*." And Cardinal Caietan (ad Lev. xviii.), "Taken nakedly, they have a certain moral indecency (or unbefittingness, indecentiam) annexed to them;" and Gregorius Tholosanus, "considered absolutely, in themselves, they are bad" (Jur. Canon. Præl. de Sponsal., iii. 29).

82. You said, that the modern writers were obliged to give up the argument of its being against the Divine law —what do you mean by their being "obliged to give it up?"—I mean that they cannot use consistently the language of their older writers. The Council of Trent took the side of the Popes who had dispensed within the Levitical degrees; and what was Catholic before, it declared heretical. Thus Sanchez, having quoted a large number of schoolmen and canonists, that the Pope cannot dispense between brothers and sisters, says, "Yet I would warn that you must be on your guard as to most of the authors alleged in the preceding section, who, being of opinion that the degrees of consanguinity and affinity, Lev. xviii., formerly forbidden by Divine law, are now

also forbidden by the same law, assert, that in none of them can the Pope dispense, which was then condemned as heretical in the Council of Trent, sess. 24, can. 3. 'If any say that the Church cannot dispense with some of them, let him be anathema!'" (De dispensat. L. viii. disp. 6, n. 11.)

483. You are speaking exclusively of the modern writers of the Roman Catholic Church?—Yes.

484. You take a distinction between the construction which the Church puts upon Holy Scripture, and the authority of the Church?—Yes.

485. Will you have the goodness to explain how that distinction is applicable to the present question?—What I meant was, that the concurrent interpretation of any passage of Scripture by Christians from the first, is one of the strongest presumptions that that interpretation is right.

486. Is not the construction put by the Church upon Scripture the same as the authority of the Church upon a matter of this kind?—The Church might prohibit certain marriages upon the ground of unseemliness, or danger to purity, without thereby declaring them altogether contrary to the will of God. And the very fact that that practice of the Church has varied, that in the first ages it prohibited the Levitical degrees only, then gradually extended its prohibitions to the seventh degree, and then again, in the West, limited the prohibitions to the fourth, and, among ourselves, has returned to the primitive rule, of course shows that the Church might act differently at different times. But the meaning of Holy Scripture, to which the Church is, in successive ages, a witness, is not a rule by which the Church binds others, but one by which it is bound itself.

487. Then, do you consider that these marriages were prohibited by the Church both upon the ground of the construction put upon Scripture, and by its own authority?—Or rather, that they were prohibited, because the Church believed them to be contrary to Scripture.

488. But that is not the case in later times. In later times they have been dispensed with on the ground that they

were not contrary to Scripture?—Or rather that the Church has the right to enforce, or (for some very grave cause) to dispense with the prohibitions of the Levitical law. But that objection would go very much further than the marriages now under consideration; indeed, so far as to destroy its practical application altogether. For it is now laid down, that the Pope can dispense in what is not at once forbidden by the law of nature also; and so it is commonly held now, that he can dispense in all the degrees forbidden by the Levitical law, except between parents and children, and brothers and sisters. Thus Sanchez sums up (de matrim. L. viii. de dispens. Disp. 6, § 12), "They who think that by the law of nature marriage is null between any whatsoever in the ascending and descending line, think that in those degrees the Pope cannot dispense. And they who think some of *those* degrees were brought in by the Pontifical law alone, think that they are subject to Papal dispensation. And in like way do they think as to the degrees of affinity and other hindrances. As Soto saith excellently (4 d. 40, q. u. a. 3, col. 3 vers., in capit. ergo), these things are convertible. 'This hindrance severs marriage by the divine law of nature' (jure divino naturali, as opposed to the positive, or Levitical law); 'the Pope, then, cannot dispense in it;' and 'It severs by the Pontifical law alone, therefore he can.' Wherefore since, in our opinion, of the degrees of consanguinity, the first only in the ascending line, namely between parents and children, and the first only in the transverse line, as between brothers and sisters, sever marriage by the law of nature, in these two degrees the Pope cannot dispense, but in the rest he can. In like way, since, according to our opinion, *in no degree of affinity, even of the direct line,* (*i. e.* not between the father and daughter-in-law, and the son and his mother-in-law,) is marriage made null by the law of nature, the Pope can dispense in the whole thereof." He adduces numerous authorities expressing this same opinion, (L. vii. Disp. 51, § 19,) that in the ascending or descending line, the first degree is alone forbidden by the law of nature, although he says, "it is not to be denied, that the other

degrees are, *in a certain way*, against the law of nature, *when there is no just cause;* because it bears on its face a sort of natural unbeseemingness, unless it be made creditable by some just cause." And in the transverse line, he quotes a very large body of authorities, who allege, that the marriage of brothers and sisters is not void by the law of nature (L. vii. Disp. 52, § 10), although he himself holds, "as the more probable," that it is forbidden and null (*ib.* § 11). He infers, that God has left no power to the Church to dispense in such case, "because it has never so dispensed" [and a case is mentioned, in which application was made for dispensation to marry an own sister, and refused, § 11]. Even in the direct descending line, Soto makes it a question, whether the Pope could not dispense between a grandfather and a granddaughter; "*perhaps*, the Pope cannot by dispensation permit a marriage between a grandfather and granddaughter; at least, he is nowhere said so to have done, nor do I think he will venture to do so" (dist. 40, q. un., art. 3). Henriquez (summ. theol. moral. L. xii. c. 1) explicitly says, "by the power given him of God, the Pope could, out of a grave cause, dispense that a grandfather be married with his granddaughter;" and much more certainly he dispenses in the other degrees. Cardinal Caietan holds the same; and Reginaldus (Praxis pœnitentialis, Lib. xxxi. n. 117) says, that in all degrees, except parent and child, there may be "causes" which should render marriage allowable, and so the object of dispensation. And, first, of brother and sister; and of these he gives three. "First, necessity—where no other wife can be had, as at the beginning of the world. And, although such necessity has now no place in private persons, yet *it may*, sometimes, *in a great prince*, who may be unable to find another wife, except of his own blood, to correspond to his dignity. Second, that pure religion be preserved. Third, the preservation of peace and friendship, especially amid those near of kin." Estius selects six relations of consanguinity and two of affinity, in which (if in any) it would be probable that marriage would not only be unlawful, but null, by the law of

nature. They are mother and son, father and daughter, own sister, half-sister, step-mother, step-daughter. "Yet, of the four last, *some*," Estius says, "and among them Caietan (in 2, 2. q. 154. art. 9), think that they are not prohibited by the law of nature" (in iv. 40, n. 5). And Soto, "Although the contrary opinion is, perhaps, not without probability, yet it seems *more probable* that this kind of the first degree of affinity (step-son and step-mother, &c.) is so prohibited by nature, that the Pope cannot dispense as to it. And it is a very great argument, that no dispensation of this sort is said ever to have taken place. Yet the contrary opinion [that the Pope could dispense] is not destitute of all probability; for, certainly, a step-mother is not really a mother." And Stambach (Supp. ad Biel. 41, q. 1), "Hence, some say that the Pope cannot, at this day, out of his will or direct power, dispense in this first degree of those collateral kin (brothers and sisters). Of his absolute power perhaps there is a doubt. But whether in the evangelic law, there be any clear prohibition as to this, I know not. But if the sayings of Scotus be followed out, the answer will be very plain as to the authority of dispensing, what the Pope can or cannot do in every degree, collaterally [*i. e.* that he can dispense with all] at least, in fact; but as to right (de jure), it is otherwise, lest the Church be troubled." The very ground taken by those who deny the Levitical degrees is, that they are part of the law which was done away; that our Lord enacted no positive law; and that so there is no rule on the subject of degrees of marriage, except those of the Church on one side, or man's natural instinct on the other. But the very discussions among the schoolmen show that it is very difficult to draw a line, apart from the law of God. One says plainly, "It is very difficult to prove clearly that any consanguinity severs marriage by the law of nature, and much more difficult between whom it severs, especially from those principles alone by which this is commonly wont to be proved" (Ægid. de Coninck, in S. Thom. de Sacr. T. 2, disp. 32, Dub. i. n. 8). The line taken by the ancient Church and the Church of England, rejecting all

involved in the Levitical degrees, is a clear and distinct one; the Church of Rome has a distinct and strong line in its own authority, and does virtually proceed on the Levitical degrees, even while it does not allow them to be absolutely binding: but the discussions on the subject show, that there is no tangible line besides. St. Augustine says, on this subject, "custom has very great force either to invite or to repel the feelings of men" (de Civ. Dei, xv. 16). A recent writer on this subject has quoted a saying of Mr. Justice Story, that "marriages between brother and sister *by blood, are deemed* incestuous and void, and, indeed, repugnant to the first principles of social order and morality; but beyond this, it seems difficult to extend the prohibition on principle."

489. Are you aware, as a matter of fact, that since Lord Lyndhurst's Statute, in the year 1835, many hundreds of these marriages have taken place?—I never heard of it.

490. It appears by the evidence before the Commissioners, that at least from 1200 to 1400 of these marriages have taken place in a few districts of England alone, since 1835. Now, it is unnecessary to ask you whether you do not consider that to be a very great evil, inasmuch as the marriages are void by law, and the children are illegitimate. Does it occur to you, that any measures could be adopted to prevent the recurrence of this state of things in future?—I suppose that the answer must depend partly on the nature of the majority of those marriages, whether many have been celebrated, in ignorance of the fact, by clergy of the Church, or whether most have been civil contracts before the Registrar; what proportion of them are otherwise reputable marriages, and what, from previous illicit intercourse, were in themselves disgraceful, apart from the incest; whether those persons, otherwise decent, who contracted them, were well-instructed how such unions had ever been regarded by the Church, and still are in our own. But I should say, generally, any thing would tend to prevent such unions, which should increase the publicity of marriages. The great misfortune is, that, especially in towns, marriages are celebrated, and those who have to

celebrate the marriages do not know the circumstances of the parties whom they are to marry.

491. Can you suggest any means by which it would be possible for clergymen in large towns to ascertain that, without an amount of labour which would be overwhelming?—I think it is for the Bishops to suggest that. It is, of course, impossible to suggest an *adequate* remedy for any moral evil, while the fundamental evil, the disproportion between the teachers and the taught, and the consequent ignorance of the great mass of the people remains unmitigated. Not this alone, but every thing must be disordered, so long as our clergy are so frightfully few, in proportion to the souls nominally in their charge, as they are in our great towns. In rural populations, or where our clergy are at all adequate to their charges, it need not be. As it is, while every form of sin is rife everywhere, it would be very misplaced to lay any stress on the frequency of one, which is only a part of a countless heap, which can only be *mitigated*, until God give us more labourers in His vineyard.

492. Can you suggest any means?—I should have thought that it might easily have been one of the preliminary inquiries, without which the licence should not be granted. Parties married by the Church might be required, on applying for a licence or the publication of banns, to state explicitly that they were not within the degrees prohibited by the Church of England. A list of such degrees is of easy reference, being appointed to be kept in churches. And I have understood that the clergy of the United States have ascribed to this appointment the absence of much licence, which exists in their own country. Such a question might easily be framed by a lawyer; as, "Are you connected by blood, or by marriage, or by the marriage of those near of kin to you? If so, what is the connexion?" And felony might be made the punishment of a false answer, as it now is of a false return on the part of the clergy. For, if the laxity spoken of take place among nominal members of the Church, it must be that such persons evade the inquiry, as to there being "any impediment why they may not be

lawfully joined together in matrimony," as, in their own judgment, not regarding the prohibited degrees as such. And, indeed, they must have some such evasion, to enable them to go through the marriage service at all. But I never heard of the amount of the evil. It was out of my province altogether to think of the question. I would observe (not that I would attach any weight to it myself) that in the foreign Protestant bodies, the chief authorities have spoken against these marriages, both among the Lutherans and the Calvinists. But in Germany at least, there was great laxity from the very first, of which Melancthon had to complain. The Electors of Saxony had the rules of marriage read twice in every year publicly in the churches (Meyer, Uxor Christiana, de gradib. prohibit. c. 1, § 2).

493. Are you aware that by the law prevailing at present in France, in nearly the whole of Germany, in Denmark, and all the Protestant States on the continent, these marriages are now permitted?—I have heard Germans lament it very much indeed.

494. Are you aware that the fact is so?—I am aware that it goes further than that; that uncles and nieces are allowed in Germany to marry indiscriminately. And this would be the great practical difference between dispensation in the Roman Church, and relaxation of the law among ourselves. What in the Roman Church hardly ever takes place, and is allowed (when it is allowed) to an individual only on special grounds, if it were allowed among ourselves, would be under no restriction whatever. It is opening a flood-gate which can never be closed. St. Ambrose says the same of civil relaxations in his time as to the civil laws about first cousins; "It availeth to him only to whom the relaxation seemeth to be given." Whereas with us it would be a question, not of permission in particular cases, but of its becoming universal.

495. Do you say that in Germany the marriages of uncles and nieces are permitted?—Very generally.

496. In Protestant States?—In Protestant States. I have been told so by Germans, and they lament it very much.

They have told me that all domestic relations are in consequence broken up; that the uncle's house cannot be the home for the orphan niece, nor the sister-in-law take charge of her deceased sister's children, since marriage is permitted. It has always been thought one ground why marriages between those near of kin have been forbidden, that it extends the domestic relation. No other affection can be called out in pure minds where none can have place lawfully. "Marriage," says St. Antoninus, Archbishop of Florence, an eminent schoolman, "is ordained to check concupiscence, but concupiscence is not checked, but rather increased, if the marriage union were allowed between those persons who have intercourse in the same house; whence the Divine law, with good reason, forbade such unions. For since choice is only of things possible, the very fact, that what might become an object of desire is impossible, diminishes or takes away all desire for it; so, then, as long as there could be marriage between those men and women who dwell together in one house, concupiscence would have no rein, so long as they did so dwell together. But when marriage becomes impossible among such, as being forbidden, all such desire ceases" (de prohibit. matrim. inter consanguin. c. 17). And the wider pure natural affection, the further is the extension of such prohibition safe; whence it has been wider in the Christian Church than in the Jewish, by reason of the greater love; and the larger is the licence to marry, the fewer will they be who can live together. I may add, that the absence of such prohibitions may often embitter or throw constraint on affections, even in the wife's life-time: now the sister is a privileged person, because she can only be a sister. Neither the affection nor the intercourse can be the same when, as in Germany, she can replace the wife. Nor are they. On the other hand, I am informed by Germans, that the state of marriage in Germany is very frightful; divorces may be obtained by mutual consent, and the parties so divorced may marry again, though the woman seldom does; the consent must *nominally* be mutual, but the consent is not by any means always free. I asked a

German doctor of philosophy lately, as to the state of marriage, and he said, "It makes a German cover his face with his hands for shame."

497. You have no experience of the effects of this law practically in a populous parish, or anything of that sort?—No.

498. Your position in the University does not tend to make you acquainted with that?—Not at all.

499. Is there anything that you would wish to add to your evidence?—I hardly know whether I am entitled to express to the Commissioners any strong convictions of my own. But if so, besides what I have already said, that such a relaxation as this contemplated can bring no blessing, as contrary to the law of God, I would say—1. That such relaxation is opening a question which, when opened, cannot be closed. The marriages now in question are but the first outworks; if they were conceded, further questions would be raised, which it would be impossible to meet on any principle. The next step is that of the uncle and niece, which (as I said) is allowed and practised commonly in the countries held up for our pattern in this. But such marriages as introduce a confusion of relations seem contrary to nature itself, as St. Ambrose observed of old. It is unnatural that a woman should be first-cousin of her own children, in one relationship on an equality, in the other requiring reverence, and so on. Or again (in the case of the wife's sister), that the children of the two marriages should be both brothers and sisters, and first cousins. And yet this is but the very beginning of such changes; nor if this principle be sacrificed, can any consistent limit be placed, short of the very deepest incest. 2. These relaxations would sacrifice those who wish to cherish the natural affections toward the wife's family, to those who wish to make the sister-in-law the second wife. An instinctive feeling of propriety has made it a rule of society that persons whom the law allows to marry cannot remain under the same roof unmarried. In whatever degree the marriage law is relaxed, in that degree are domestic affections narrowed. 3. It may be worthy of the attention of the Commis-

sioners, that a change of the civil provisions as to marriage does not alter the duties of the clergy, who remain under the canons. They could neither celebrate such marriages, nor consider persons so united as married in the sight of God. These are, however, ulterior, though in fact great evils, threatening the breaking up of those domestic habits which are so great a blessing to the English nation. *The* great evil is the contradiction to the law of God.

00. Are you aware whether the Greek Church exercise any dispensing power with regard to marriage?—I understand that there is no dispensing power in the Greek Church. I was told positively not, by one who resided for some years in Greece; and also, that the feeling on this subject is so inwrought into the minds of the Greeks, that no one would wish for a dispensation. They regard such marriage in the same light as St. Basil did, and would turn away from the thought with abhorrence. On the practice of the Greek Church I have obtained a statement from the Rev. W. Palmer, M.A., Fellow of Magdalen College, who has made the Russian Church a special object of study (as the Commissioners are aware), and beg respectfully to submit it to the Commissioners.

Statement as to the Marriage Law, in reference to the Prohibited Degrees, in the Greek Church; by the Rev. W. Palmer, M.A., Fellow of Magdalen College, Oxford.

The most recent digest of the Canon Law of the Greek Church (properly so called) now in use, is the πηδάλιον, set forth in the Romaic or modern Greek, under the instructions of Theodoret, a priest-monk of Mount Athos, and printed at Leipzig, A.D. 1800, upon the basis of the older Hellenic Nomocanons of Photius and Johannes Scholasticus, with the later glosses of Zonaras, Ariston, Balsamon, &c. &c. In those parts of the Eastern Church, where the Slavonic language has ever been in use, there are various Slavonic Nomocanons agreeing, in the substance and order of their contents, almost exactly with

the modern Romaic πηδάλιον, except, that they follow more closely the older Hellenic Nomocanons (from which they were all translated and compiled) in retaining certain extracts from the civil laws of the Græco-Roman emperors. The same remark applies also to the Nomocanon of the Georgian Church, which is in the Georgian language. These extracts from the civil laws do not appear in full in the latest modern Greek or Romaic πηδάλιον, but would be found by the modern Greek canonist partly (*i. e.* those of the subjects which are more ecclesiastical) in the epitome of Constantine Hermenopulus, partly (*i. e.* those of them which are more properly civil) in the Hexabiblos or Procheiron of the same author.

In all these books, there is a section on the subject of the different kinds of relationship, and on the prohibited degrees in each kind. This section follows immediately after the Canons of the Councils and of the Fathers, collected in accordance with Canon II. of the Council in Trullo (called by the Greeks the Quini-sext., and identified with the Vth and VIth Œcumenical), and afterwards enlarged by the accession of the Canons of the VIIth Œcumenical Council, and the glosses of the canonists, &c.; what follows is abridged and extracted from the Slavono-Russian Nomocanon, or Kormchay, printed at Moscow by the Synodal press, A.D. 1834. Part ii. sect. l. fol. 74. The like to which may be found in the modern Greek πηδάλιον of 1800, at the corresponding place; also in various places of the epitome of Hermenopulus (especially lib. viii.).

After distinguishing five kinds of relationship, arising, I. from blood; II. from the union of *two* families by a marriage; III. from the union of three families by two marriages; IV. from god-parentage; and V. from adoption, it is laid down that—

I. *In the First kind*, marriage is forbidden to the 7th degree (inclusively),[q] and allowed in the 8th (*i. e.* that a

[q] N.B. The Easterns reckon the degrees thus: the husband and wife are absolutely one, and the source of children; from them to the sons and daughters is *one* degree, is the 1st: from one brother or sister to another are two degrees, *i. e.* one from the one brother to the common

man may *not* marry his 2nd cousin's daughter; but that 3rd cousins *may* intermarry together, and that a man may marry his 2nd cousin's grand-daughter).

II. *In the Second kind*, marriage is forbidden universally through five degrees: but with regard to the 6th and 7th degrees there is a distinction made, it being permitted in certain cases in the 6th, but prohibited in the 7th; while in certain other cases, on the contrary, it is prohibited in the 6th, but permitted in the 7th degree.

III. *In the Third kind*, it is forbidden by law only in the 1st degree; but the custom extends the prohibition to the other degrees.

IV. and V. *In the Fourth kind*, and also *in the Fifth*, it is forbidden to the 7th degree; but the prohibition in these two kinds applies only to the right line descending; and in the 8th degree marriage is permitted.

Without being more particular on the first, fourth, and fifth kinds, I will copy out the tables given for the second and third kinds.

For the Second kind—1. A man cannot marry a mother and her daughter; for the latter is in the 1st degree to him (*i. e.* as his own daughter), nor can he (which is the same thing), after marrying the daughter first, upon her death marry the mother; for he is in the first degree to her (*i. e.* is as her own son).

2. Nor can he marry the granddaughter of his deceased wife, for it is the 2nd degree.

3. Nor the great-granddaughter (*i. e.* the 3rd degree).

4. Nor the great-great-granddaughter (4th degree).

5. Nor two sisters; for his deceased wife's sister is as his own sister (*i. e.* is in the 2nd degree).

6. Nor the niece of his deceased wife (3rd degree).

7. Nor the grand-niece of his deceased wife (4th degree).

8. Nor the 1st cousin of his deceased wife (4th degree).

9. Nor the daughter of his deceased wife's 1st cousin (5th degree).

father and mother, and another one from them to the second brother; this then is the 2nd degree. From uncle to nephew, in the same way, will be three; from 1st cousin to 1st cousin four; and so on.

10. Nor his deceased wife's 2nd cousin (6th degree).[r]

11. A man *may* marry the daughter of his deceased wife's 2nd cousin, for she is in the 7th degree to him; and the 7th degree in this second kind of relationship is here permitted.

12. A father and his son cannot marry a mother and her daughter (for there are 2 degrees).

13. Nor can they marry a grandmother and her granddaughter (for there are 3 degrees).

14. Nor a great-grandmother and her great-granddaughter (for there are 4 degrees).

15. Nor a great-great-grandmother and her great-great-granddaughter (for there are 5 degrees).

16. Nor two sisters (for there are 3 degrees).

17. Nor an aunt and her niece (for there are 4 degrees).

18. Nor two 1st cousins (for there are 5 degrees).

19. But a father and his son *may* marry a woman and her 1st cousin's daughter (in this case marriage is permitted in the 6th degree).

20. On the other hand, they may *not*[s] marry two

[r] [N.B. Novell. Lib. iv. of Constantine Hermenopulus, tit. 6. "Holy Church forbids a man to marry two 2nd cousins, for this is "not, as some suppose, the 7th degree, but it is the 6th degree; for "the man and his wife, who are [originally] married together, make "but one degree. And this question was asked in the time of the "Patriarch Nicolaus, and it is forbidden. And there is an edict put "forth by the Emperor Manuel, and he decrees that no such thing is "on any account to be permitted." (And then, after another similar quotation, which is here omitted),

From the decision of the M. H. Patriarch of Antioch, Balsamon, on the question whether a man may marry the 2nd cousin of his deceased wife, at the end, "We know that it is canonically and justly forbidden "by the authority of the Church for a man to marry two 2nd cousins, "or *vice versâ:* but if any such thing should have occurred, they "must, without any excuse or evasion, be made to separate, and must "be put to penance."]

[s] [Question.] [Why do we allow a father and his son to marry a woman and her 1st cousin's daughter, but not allow them to marry two 2nd cousins?—Answer. Because the father and his son marrying a woman and her 1st cousin's daughter, still keep their relative difference of father and son: whereas their intermarrying with two 2nd cousins would make them brothers-in-law (in the 3rd degree) to one another. And in the first case no confusion of names is caused; but wherever any such confusion is the consequence, marriage is not permitted.]

2nd cousins (in this case marriage is forbidden with the 7th degree).

21. A father and his son cannot marry a woman and her grand-niece (for there are 5 degrees).

22. A grandfather and his grandson cannot marry a mother and her daughter (for there are 3 degrees; *i. e.* it is as if the grandson were to marry his aunt).

23. Nor a grandmother and her granddaughter (for there are 4 degrees).

24. Nor a great-grandmother and her great-granddaughter (for there are 5 degrees).

25. Nor two sisters (for there are 4 degrees).

26. Nor an aunt and her niece (for there are 5 degrees).

27. But they *may* marry an aunt and her grand-niece (though this is in the 6th degree).

28. Also they *may* marry a woman and her 1st cousin's daughter (in this case marriage is allowed in the 7th degree).

29. But they can *not* marry two 1st cousins (in this case the 6th degree is prohibited, that they may not be brothers-in-law to one another in the 2nd degree or generation).

30. A great-grandfather and his great-grandson cannot marry two 1st cousins for the same reason (though this is the 7th degree).

31. But they may marry an aunt and her niece (which is the 6th degree).

32. Two brothers cannot marry two sisters (for there are 4 degrees). [*i. e.* one brother is to the other brother in the 2nd degree; and the latter brother is one with one of the sisters, and between her again and her sister there are 2 degrees.]

33. Nor an aunt and her niece (for there are 5 degrees).

34. Nor two 1st cousins (for there are 6 degrees).

35. But they may marry a woman and her 1st cousin's daughter (in this case the 7th degree is permitted.)

36. Also they may marry two 2nd cousins (for the 8th degree is in every case permitted).

37. They cannot marry a mother and her daughter (for there are 3 degrees).

38. Nor a grandmother and her granddaughter (for there are in this case 4 degrees).

39. Nor a great-grandmother and her great-granddaughter (for there are 5 degrees).

40. Nor a great-aunt and her grand-niece (for there are 6 degrees).

41. An uncle and his nephew may marry an aunt and her niece (for in this case the 6th degree is allowed) [there being 3 degrees on either side].

42. But if the uncle marry the niece, the nephew cannot marry the aunt, as there would be a confusion of relations (so in that case the 6th degree is prohibited).

43. They may marry two 1st cousins (here the 7th degree is allowed).

Of the third kind of relationship, arising from the intermarriage of individuals of *three* families (*e. g.* I represent one family, my wife and her brother a second, and my wife's brother's wife a third).

1. If my wife die, I cannot marry my wife's brother's wife's sister [*i. e.* my brother-in-law's sister-in-law], for the 4th degree is prohibited. [And there are two degrees between me and my brother-in-law, and two again between him and his sister-in-law.]

2. Nor can I marry my brother-in-law's wife (for there are 2 degrees). Nor can my own brother marry her (for the same reason).

3. Nor can I marry the wife of my step-son (for there is 1 degree).

4. Nor can my brother marry the wife of my step-son (3rd degree).

5. Nor can a woman be married to her step-son (1st degree).

6. Nor can I marry the wife of my deceased wife's uncle (3rd degree).

7. Nor the step-daughter of my brother-in-law (3rd degree).

8. Nor my sister's husband's brother's wife (for it is the 4th degree).

9. Nor my daughter's husband's brother's wife [*i. e.* my son-in-law's sister-in-law] (for this is the 3rd degree).

10. But I may marry my son-in-law's brother's wife's niece (which is the 6th degree).

11. And my wife's brother may marry my own brother's wife's niece (this is the 7th degree).

12. A man and the brother of his deceased wife cannot marry two sisters (for this is the 4th degree).

With respect to the particular case of marrying two sisters, if it be desired to trace the antiquity of the prohibition in the Eastern Church, and to know upon what precise grounds it rests, the following statement may be sufficient. [The citations are translated from the Greek text of a volume entitled "The Canons of the Holy Apostles, the Holy Œcumenical and Particular Councils, and the Holy Fathers," printed by the M. H. Synod, at St. Petersburgh, with the original Greek text, and the Slavonic version in parallel columns, A.D. 1839, and sent from Russia to many of the chief prelates throughout the whole Eastern communion. The same may be found also in any edition of the Nomocanon, Kormchay, or πηδάλιον in the corresponding place.]

Canon XXIII. of St. Basil (Epist. II. to Amphilochius of Iconium), at p. 362 of the volume above referred to, is as follows:—

"Of the case of such as marry two sisters, or are married to two brothers, we have put forth a brief, a copy of which we herewith send to thy piety. But if any one take to wife the wife [*i. e.* the widow] of his own brother, he is not to be reconciled unless he have first separated from her."

[The brief referred to is the "Epistle to Diodorus of Tarsus," which stands in all the Nomocanons either as Canon LXXXVII. or LXXXVI. of St Basil, and in the volume here used occurs at p. 380.] It is as follows:—

[*The Preface.*]—There was brought to us recently a brief or epistle, bearing the signature of Diodorus, but in all other respects fit to be ascribed to any one rather than to Diodorus, for it seems to me that it must have been

some ignorant fellow, who by personating thee, hoped to impose upon others with a show of authority. Whoever it was, having been consulted, as he represented by some man, whether he might lawfully marry his deceased wife's sister, he not only showed no horror at the question, but coolly entertained it, and even countenanced the man, and defended zealously enough, and argumentatively, that his licentious idea. If it had been still in my possession, I would have sent thee the writing itself, and so thou wouldest have been able to defend thyself and the truth. But since he who showed it me, took it away again and carried it about as a sort of trophy against us, who have all along forbidden any such thing to be done, saying that he had authority in writing to do it, I have now sent [the accompanying Constitution] to thee, that we may join our forces against that spurious document, and leave it no force to deceive, as it otherwise might, perchance, any incautious persons to whom it may come.

[*Canon* LXXXVII.]—The first argument, (and it is the strongest of all in such questions,) which we have to put forward in this matter, is that of *our custom;* a custom, which has the force of a law, inasmuch as our rules have been transmitted down to us by holy men. And our *custom* is this, "that if any man being overcome by filthy passion fall into an unlawful union with two sisters, neither is such union to be accounted marriage, nor are either of the parties ever to be reconciled to the unity of the Church, unless they have first parted the one from the other. So that even though we had no other argument to bring, our *custom* of itself would suffice as a defence against any such mischief.

But since the writer of that epistle has sought by his fraudulent composition to bring into our social life so great an evil, it is needful that neither should we on our side be slack to oppose a defence of sound words; although, in things that are so very clear, that prejudgment, which every one of us must feel, is far stronger than any argument.

"It is written," he says, "in Leviticus, Thou shalt not take a wife to her sister to vex her [ἀντίζηλον], to uncover

her nakedness, beside her [ἐπ' αὐτῇ, ἔτι ζώσης αὐτῆς] in her lifetime. [Lev. xviii. ver. 18.] It is manifest, then (thus he reasons), from this text, that it *is* permitted to take her after the first sister is dead." In answer to this, I will say, first, that—

[I.] Whatsoever the law saith, it saith to them that are under the law, else, by parity of reasoning, circumcision too, and the Sabbath, and abstinence from meats, might be urged upon us; for it will hardly be pretended, I suppose, that if we find anything in the law favourable to our own pleasures, we are in this to put ourselves under the yoke of the bondage of the law, but if any of the things enacted by the law seem to be grievous, we are then to run off to the liberty which is in Christ.

[II.] I was asked, "*Is* it written [or is it *not* in the Scripture] that a man may take a woman to [or after] her sister?" I replied (and this is both a true and a safe answer), that it is *not* so written. And to infer and conclude from the clause added after [the prohibition] something else, about which nothing is actually said, is to legislate, not to take the law as it stands; for—

[III.] If such a principle of interpretation be admitted, he who wills may lawfully venture, even while the first sister lives, to take the other. The same sophism will serve equally for that. It is written, he will say, "Thou shalt not take . . . . . *to vex her*" [ἀντίζηλον], so then, if there be no danger of her vexing her, there is no prohibition [ὡς τήνγε ἔξω τοῦ ζήλου λαβεῖν οὐκ ἐκώλυσεν]. Whereupon, he who is pleading in favour of his own passion, will settle it that the two sisters are so disposed as to be in no danger of vexing or being vexed; and so the reason given for the prohibition not existing, what (he will ask) is there to prevent his taking and having the two sisters together? But this is not written, we shall answer—neither in the other case is the allowance that is contended for expressed. But the sense of the clause added [after the words of prohibition] opens the door equally to both. However—

[IV.] If we had first gone back a little to some words of the previous legislation [at the beginning of the same

chapter of Leviticus, xviii. ver. 3], we might have got rid of our difficulty. For the lawgiver in this place seems not to be enumerating every form of sin, but especially forbidding the sins of the Egyptians from whom Israel had come forth, and of the Canaanites to whom Israel was being removed. For it is thus written: "After the customs of the land of Egypt wherein ye sojourned shall ye not do; and after the customs of the land of Canaan into which I will bring you shall ye not do: neither in their ordinances [νομίμοις, ways, maxims] shall ye walk." So then probably this particular form of sin may not have been common then among the Gentiles; and on this account the lawgiver may not have needed to make any additional provision against it, but may have contented himself with the existing and untaught custom to condemn the abomination. But how then was it (it will be asked) that when he *had* forbidden the greater [offence against such existing and untaught custom or feeling] he said nothing about the less [which might seem to need it more]? Because (we answer) there was something likely to be hurtful to many of the more carnal sort, and to give occasion to their taking to wife one sister after another while both were living, in the example of the Patriarch [Jacob]. But as for us, which is rather our duty, to speak that which is written, or to be curious about that which is not written?

[V.] Take another case: That it is not right for a father and his son to come near to the same woman; neither shall we find that written here in these laws; and yet the Prophet treats it as a sin of the very deepest dye. For "a son (he says) and his father will go in unto the same maid" [Amos ii. 7]. And how many other forms are there not of unclean lusts, devised by the school of devils, which the Divine Scripture has passed over in silence, as being unwilling to pollute its own sanctity by the names of things shameful; distinguishing uncleannesses only under general heads? As the Apostle Paul says, "But fornication and all uncleanness, let it not be so much as named among you, as becometh saints;" comprehending, under the one general name of

"uncleanness," all the unmentionable sins both of males and of females; so that it is not true at all that the silence of Scripture carries with it a licence for the lovers of pleasure.

[VI.] Not that, as regards our present question, I can ever allow that such sins have, in point of fact, been passed over in silence; far from it! I assert that the lawgiver has forbidden them very expressly. For this text, "None of you shall approach to any that is near of kin to him, to uncover their nakedness" [Lev. xviii. 6], takes in this kind of "nearness" also. For what can be "nearer" to a man than his own wife; or rather, than his own flesh? For "they are no longer two but one flesh." So then, through the wife, her sister necessarily comes to be "near" to the husband. For as he is not to take the mother of his wife [Lev. xviii. 17], nor his wife's daughter [*ibid.*], because neither can he take his own mother or his own daughter, so [by parity of reasoning] neither is he to take the sister of his wife any more than his own sister, and *vice versâ;* neither will it be lawful for a woman to be married to any that are "near of kin" to her husband. For the rights of kindred are common on both sides.

[VII.] But, for me, as regards marriage, if there be any one who is willing [to listen to me], I testify "that the fashion of this world passeth away, and that the time is short, and that they who have wives be as though they had them not." But if any one object to me the text "increase and multiply," I smile at his ignorance in not distinguishing between the times of the [different] legislations. A second marriage is [allowed] as a remedy against fornication, not as a passage to licentiousness. If they cannot contain, "let them marry," he says, but not so as in marrying also to transgress.

[VIII.] But neither do such, while they foul their souls by dishonest passion, respect even nature herself, which has fixed from of old distinctive appellations of kindred; nor do they consider by what names they shall call the double issue of such double marriages; of bro-

thers and sisters to one another, or of cousins? for both names will suit them equally on account of the confusion. Make not, O man, thy young children's aunt into their stepmother; nor arm against them her who ought to stand to them in affection, instead of their mother, with those implacable jealousies. For it is the stepmother's hatred only which carries its enmity beyond the grave. Other kinds of enemies are all willing to make peace with the dead, but the stepmother begins her hatred after death.

To conclude what has been said: If any man contemplates marriage according to law, the whole world is open to him; but if his desire be of lust, this is just the reason that he is to be all the more forbidden; that he "may learn to possess his vessel in sanctification, and not in the lust of concupiscence." I would fain say more; but am withheld by the limits of this letter. I heartily pray that either my admonitions may have more force than such lust, or, at any rate, that so abominable a pollution come not into my province, but keep itself in those parts where the sin was perpetrated.

And as regards the penance for such marriages, after premising that—

For incest between "brother and sister" (ἀδελφομιξία), Canon lxvii. of St. Basil appoints the same penance as for murder (p. 372 of the volume above referred to); and again, for incest with "an own sister, of the same father and mother," Canon lxxv. appoints xii. years of penance. We may notice that—

Canon lxviii. (p. 375) appoints for marrying two sisters successively the same penance as, by the preceding Canon (lxvii.), had been appointed for bigamists; that is, a penance of *seven years'* excommunication after the separation of the parties.

Elsewhere, speaking generally of marriages within the forbidden degrees (that is, of such as are of less enormity than this, or than intermarriage with a stepmother, which are both treated of in separate Canons), Canon lxviii.

(p. 372) appoints for them the same penance as for fornication (or rather more), that is, four years' excommunication after the separation of the parties.

The above discipline of the Canons of St. Basil was solemnly acknowledged and re-enacted by Canon ii. of the Council of Constantinople in Trullo, which the Eastern Church reckons as a continuation or supplement to the VIth Œcumenical Council (p. 75), and again more particularly by Canon liv. of the same Council (p. 105), in these words:—

"Inasmuch as the Divine Scripture teaches us clearly, saying, 'Thou shalt not approach to any that is near of kin to thee, to uncover their nakedness' (Lev. xviii. 7), St. Basil in the Canons which he composed has enumerated some of the forbidden marriages, but has passed over in silence the greater number of them: and both in what he said, and in what he left unsaid, he did it to edification. For while he avoided multiplying designations of shameful sins, that he might not foul his writing with bad words, he distinguished under general names the several kinds of uncleannesses, and so comprehensively taught what marriages are unlawful. But since, through such silence and the indiscriminateness of the prohibition of unlawful marriages, nature was running into confusion, we have now judged it necessary to set forth more nakedly what relates to this matter; and we define that from henceforth, if any man take to wife his own niece, or if any father and his son take a mother and a daughter, or two sisters; or if any mother and her daughter are married to two brothers; or if two brothers marry two sisters, they are to be put to the penance of excommunication for *seven* years, after having first openly separated and broken off their unlawful intercourse."

Thus this discipline, which seems in St. Basil's time to have been of immemorial antiquity, though then based, in part, only on unwritten custom, became, from St. Basil's time, and more especially from the final re-enactments of the Council in Trullo (A.D. 692), the Canon law of the whole Eastern Church, as it still continues to be

at the present day, without any change or modification.

Of the forbidden degrees among the Nestorians (who have been separated from both Greeks and Latins since A.D. 431), and among the Monophysites (who have been separated from both Greeks and Latins, and also from the Nestorians, since A.D. 451), I can say but little, not being able to refer to their books; but I believe their discipline is identical with that of the orthodox Eastern Church. At any rate, I have been credibly informed that it is so; and, more especially, as regards the Monophysites (for the Armenians, the Syrians, and the Copts and Abyssinians, though they have three distinct rites in four different languages, and were originally three separate communions, now all intercommunicate together), I have had this information from members of the Russian Church who had travelled in the East, and were curious in ecclesiastical matters, and who, in their own country, were in habits of constant intercourse with educated Armenians, both of the higher clergy and laity, and had friends married into Armenian families. Such persons have often assured me that, except in some points of the ceremonial and in the peculiar doctrine which makes them heretics, there was absolutely no difference between the discipline of the Armenian, or indeed of any of the heretical Eastern communities, and that of their own Church.

And, as regards the Nestorians (whose separation is of still more ancient date than that of any of the Monophysites), I may notice an incidental allusion to the number of the degrees prohibited among them, which seems fully to bear out the general assertion given above as applying to all the heretical Eastern communities; and so to the Nestorian Church among the rest. This occurs in a volume entitled "Missionary Researches," published in London A.D. 1834, by two American gentlemen, Messrs. Smith and Dwight. The passage is as follows:—

"The book called the Synodus (he said) [the speaker is a Nestorian bishop, with whom the American missionaries conversed between Koosy and Jamalava, and

who showed them the book itself at the time] contains all the laws and canons of the [Nestorian] Church; and by it a bishop can decide any question that is liable to come before him. In the case of a proposed marriage, for example, he can determine from it whether the parties are within the forbidden degrees, *which are* (he affirmed) *sixty-five in number*, including, as I understand, some grades of the affinity that exists between sponsor and godchildren."—p. 407.

Now, if we reckon up all the degrees that are forbidden in the Nomocanons of the orthodox Eastern Church, under the first four of the five kinds of relationship, so as to agree with the Nestorian bishop (the American missionaries' informant) in "including those grades of affinity which exist between sponsors and godchildren," we shall find just *sixty-four* in all, which is so near the number given by the Nestorian bishop (and it is easy to account for the slight discrepancy which does exist), as to leave no doubt (even if other assurances were wanting) of the identity of the Nestorian tradition in this respect with the Greek.

So that, upon the whole, it seems that there are four separate and independent witnesses, preserved from the fifth century in different parts of Asia and Africa (in the, 1, Nestorian or Chaldean; 2, Syrian, or Jacobite; 3, Armenian; and 4, Coptic and Abyssinian Churches), and still existing to testify to the truth of the assertion made by St. Basil, and reiterated by the Council in Trullo, that the discipline of their canons represented the original and apostolical custom and tradition of the East.

That neither the Eastern Orthodox Church, nor any of the heretical churches of the East, whether Nestorian or Monophysite, admit or exercise any power of giving dispensations for marriages within the prohibited degrees, or of giving any other similar dispensations beyond or contrary to the canons (for, in some cases of discipline, there is a power of dispensation expressly given by the canons), is a matter of notoriety, allusions to which occur frequently enough, on occasion, both in conversation and

in books; though it is not easy to turn to documentary evidence of a merely negative custom. All I can do is to instance two or three incidental confirmations of the assertion that such is the fact: *e. g.*—

I. In the "Rule for the Spiritual Consistories" (*i. e.* for the Diocesan Courts) throughout the Russian empire, published at the Synodal Press, A.D. 1841, at St. Petersburgh, § iii. c. v. § 220, there is the following text:—

"The diocesan authority, in judging of the unlawfulness of any marriage by reason of relationship of blood [the word includes affinity], or spiritual relationship, must ground its decisions on a careful consideration of the proofs of the relationship, and a comparison of its degrees with the canons explained in the definitions of the most Holy Synod, which are based on the correct interpretation of the Canons of the Holy Church," p. 86, without any allusion whatever to the possibility of the diocesan authority either granting itself, or obtaining from the Synod, or allowing to be pleaded, any dispensation for marriage within the prohibition degrees.

And in the printed Report made by the high procurator of all the affairs of the Church within the Russian Empire, for the year 1845, there occurs in the Appendix, under No. 9, at p. 49, a Table of all the cases relating to marriage which were carried by appeal or reference before the most Holy Synod, during the preceding year, from each of the 52 Russian dioceses; and from this Table it appears, that in the year 1845, *four* marriages were annulled by the Synod (besides what may have been annulled, without reference or appeal, by the diocesan authorities), on the ground of being within the forbidden degrees. And what is remarkable is, that all these four cases were from dioceses in which there is both a mixture of Roman Catholic Latins and also of reunited "Uniats," who had been long used to the intermixture of Greek and Latin customs and feelings. One case was from the diocese of Warsaw; another from that of Mohileff; the third from that of Podolia; and the fourth from that of Poltava. And in the body of the Report, p. 54, it is mentioned that, of 1053 persons who were, in the year

1845, confined in monasteries or convents, to do penance in consequence of ecclesiastical sentences, 643 were for adultery, and other like sins; 17 for incest; and 10 (clergy or clerks) for celebrating, or assisting in celebrating, unlawful marriages. But nowhere in the Report is there any mention of dispensations, which there could not but have been, if dispensations were given.

II. Three or four years ago, some Laplanders or Samoiedes (who had only recently been converted to the Russian Church), sent in a petition to the most Holy Synod, praying for a dispensation to eat game taken in nooses or springes, and so *strangled*, on the plea of necessity, as this was their chief or only food. But the Synod replied in writing that they must find some other way of supporting themselves, or some other way of taking their game, as there was no authority in the Church to dispense with the canons of the Apostles.

III. A Russian priest and a naval officer, with whom I was two years ago in conversation, hearing it said that in the West, and among us, two brothers may marry two sisters, and that first cousins may intermarry, expressed the greatest horror, and for some time would not even believe it. But on being shown a Roman Catholic book of theology, in which it was distinctly stated that a father and son may marry an aunt and her niece, and even a mother and her daughter, and two brothers equally two sisters, or a mother and her daughter; and that first cousins also may marry *by dispensation*, they exclaimed, "Ah! with the papal system of dispensations you may do anything!" and made the same remark that I have repeatedly heard from members of their Church, that the systematized licentiousness of the Protestants has all flowed from that source of papal dispensing power. For wherever the Pope dispenses, or claims the power to dispense, and so undermines the force and inviolability of the prohibition, the Protestants naturally enough generalize, and assume that, as there is no real nor intrinsic ground for the prohibition, they may dispense with it altogether.

APPENDIX.

In the Court of Queen's Bench.

June 15th, 1847.

THE QUEEN *v.* ST. GILES'-IN-THE-FIELDS.

ARGUMENT.

MR. BADELEY. My Lords,—I am in this case with my friend Mr. Wallinger; and I have to submit to your Lordships that the Order of Sessions must be quashed.

It has been truly stated to your Lordships that this case must rest upon the interpretation to be given to the words of the Statute of 5 and 6 Wm. IV., cap. 54; "*the prohibited degrees of consanguinity or affinity.*" The words are used in the Statute in that general way, and no attempt is there made to explain them further.

Now, my Lords, I think it is not too much to assume that when a statute, particularly a statute relating to the subject of marriage—so important in its nature and in its consequences—uses words of such general import, it must be taken to refer to some common standard, something well known, or easily ascertainable; because otherwise, the statute, by using such general terms, would be involving the question in obscurity and doubt, rather than leading to the simplification of it; and therefore, my Lords, it appears to me that in using the term "prohibited," the statute must be intended to refer to something *prohibited by law*—something contrary to the law

as then existing—and that of course, in referring to the law, it must have referred to a prohibition existing either by the statute law, or by the rules of the common law, or by the ecclesiastical law.

I propose to show to your Lordships, as briefly as I possibly can, considering how much this question has been already discussed before your Lordships, that both by the statute law, and by the decisions of the courts of common law, and by the ecclesiastical law, marriage with a deceased wife's sister is undoubtedly prohibited. I shall do so with respect to each of these, because it is necessary, in such a case as this, to put it upon its firmest basis; but I apprehend that if I proved this matter with respect to any one of these branches of the law, I should have answered the purpose that was required. I should have done sufficient to entitle me to your Lordships' judgment, for setting aside the decision of the court of quarter sessions.

I propose, therefore, to show this with respect to all these three branches of the law; but with respect to the common law, the decisions of the courts of common law resolve themselves either into explanations of the construction of the statute law, or into proceedings with reference to what has been done in the ecclesiastical courts.

Now, my Lords, I will take the case first with reference to the subject in general, and I will afterwards refer to that which is a peculiar feature in the present case, namely, the question of the application of these laws as between parties, one or both of whom are illegitimate.

I take first, my Lords, the question of the statutes; and I submit to your Lordships, that by the statutes already in force, the prohibitions are clearly ascertained; and, at all events, that the case of a marriage with a wife's sister is distinctly and clearly prohibited.

Your Lordships have been already told that there are two statutes, or rather there *were* two statutes, which contain, in express terms, the prohibitions of particular classes of persons,—the 25 Henry VIIIth, cap. 22, and 28 Henry VIIIth, cap. 7—the former annulling the king's

marriage with Queen Katharine, and affirming that with Queen Anne Boleyn; and the latter, namely, the 28 Henry VIIIth, cap. 7, annulling the marriage with Anne Boleyn, and affirming that with Jane Seymour.

Now, my Lords, I dismiss entirely from consideration the Statute of 25 Henry VIIIth, cap. 22, because, as I have already admitted to your Lordships in the course of the argument, I consider that statute to have been repealed; though I may observe in passing, that the case which my friend Mr. Wallinger has brought under your Lordships' notice would rather seem to imply that that Statute of 25 Henry VIIIth, cap. 22, has not been repealed, or that it has been revived; for it seems that in that case Baron Parke referred to the Statute, as declaring what the prohibitions were. However, it is unnecessary for me to consider at any length whether the Statute of 25 Henry VIIIth, cap. 22, is or is not in force, because I conceive it to be a matter beyond all doubt or question that the Statute of 28 Henry VIIIth, cap. 7, is completely and fully in force.

Now, my Lords, as you have already been shown, the Statute of 28 Henry VIIIth, cap. 16, refers in express terms to the Statute of 28 Henry VIIIth, cap. 7, both Statutes having been passed in the same Session of Parliament, and both being in *pari materiâ* with respect to certain marriages.

Now, my Lords, that Statute of 28 Henry VIIIth, cap. 7, was partially repealed by the Statute of 1 & 2 Philip and Mary; but that Statute 1 & 2 Philip and Mary, was repealed to a considerable extent by the Act of 1 Elizabeth. The 28 of Henry VIIIth, cap. 16, fell with many other statutes of Henry VIIIth, in the reign of Philip & Mary, and it was repealed undoubtedly by the Statute of 1 & 2 Philip and Mary, but it was revived in express terms by the Statute of 1 Elizabeth, and therefore I apprehend, according to the true construction of law, inasmuch as it was expressly and in terms revived, in the very full and clear terms to which my friend Mr. Wallinger has alluded, whatever is necessary to give full force and effect to that statute is necessarily revived with it.

Now, my Lords, it is perfectly impossible to give a full and proper construction to the 28 Henry VIIIth, cap. 16, without referring to the 28 Henry VIIIth, cap. 7, because, after providing for the case of dispensations, it uses these words: "That all marriages had and so-"lemnized within this realm, or in any other the King's "dominions, before the 3rd day of November, in the 26th "year of the King's most gracious reign, whereof there is "no divorce or separation had by the ecclesiastical laws of "this realm, and which marriages be not prohibited by "God's laws, *limited and declared in the act made in this "present Parliament for the establishment of the King's "succession*, or otherwise by Holy Scripture, shall be, by "authority of this present Parliament, good, lawful, and "effectual, and shall be, from the beginning of such "marriages, reputed, esteemed, taken, adjudged, received, "approved, and allowed, by the authority of this present "Parliament, to all and singular purposes, effects, and in-"tents, as good, as sufficient, and as available, as though "no impediment of matrimony had ever been between "them that have contracted and solemnized such mar-"riages; and that all children procreated and to be pro-"created in and under such marriages, shall be lawful to "all intents and purposes."

Supposing a question to be raised as to the validity of certain marriages under that statute, either at that time, or at the present day, and supposing it necessary to trace a question of descent, or a question with respect to the legitimacy of certain persons, how could the truth be arrived at under that Statute of 28 Henry VIIIth, cap. 16, without referring to the 28 Henry VIIIth, cap. 7, in order to see what was meant by those words? It is a necessary part and parcel of the act, which cannot be understood unless a reference is made to it. I apprehend therefore, my Lords, that, according to the true rule of construction in cases of statutes, this Act of 28 Henry VIIIth, cap. 7, must be looked at and read with the others. In Bacon's Abridgment, title, "Statute I. 1," it is laid down, "That words and phrases, the meaning of which in a statute "have been ascertained, are, when used in a subsequent

" statute, to be understood in the same sense." "A statute " ought in the whole to be so construed, that, if it can be " prevented, no clear sentence or word shall be superfluous, " void, or insignificant," as an authority for which, the King *v.* Burkett, in Shower's Reports, is quoted; and the case of the King *v.* Mason, is cited from 2 Term Reports, p. 581, and the observations of Mr. Justice Buller. There it is said, " Further, it is an established rule of law, that all acts " in *pari materiâ* are to be taken together, as if they were " one law." Afterwards, reference is made to the case of the King *v.* Loxdale, and to the judgment of Lord Mansfield, which is reported in Bacon's Abridgment, under the title of "Statute I. 3." In that very case Lord Mansfield lays down the rule in these words:—"It is a rule in the "construction of statutes, that all which relate to the "same subject, notwithstanding some of them may be "expired or are not referred to, must be taken to be one "system, and construed consistently; and the practice has "been so to do in cases of bankruptcy, church leases, and " in other cases," so that the course of construction, as applicable to this, appears to me necessarily to lead to the conclusion, that that Statute of 28 Henry VIIIth, cap. 7, must be read and referred to in order to give effect to the Statute of 28 Henry VIIIth, cap. 16.

Another case is also cited of Williams *v.* Roughedge, which is reported in 2 Burrows' Reports, p. 747; the rule there laid down being, that if an Act of Parliament be revived, all Acts explanatory of the Act so revived are revived also.

Mr. Justice Erle.—Will you be so good as to read that again?

Mr. Badeley.—It is Williams and Roughedge, in 2 Burrows, 747. "That if an Act of Parliament be revived "all Acts explanatory of it are revived also." But this Statute of 28 Henry VIIIth, cap. 7, is explanatory and is absolutely necessary to the explanation of the Act of 28 Henry VIIIth, cap. 16.

So again, my Lords, the same rule is laid down, and the authorities referred to, in Dwarris on Statutes, p. 676, in connexion with the Statutes of Henry VIIIth, which

were revived by the 1st of Elizabeth. I refer to this, in consequence of an argument which was advanced yesterday by some of my friends on the other side, that the statute of Elizabeth says that none which are not expressly mentioned shall be deemed to be revived. The rule there laid down is—"Where the words are, that no "statute not expressly mentioned shall be revived, but by "the repeal of the repealing statute a statute is revived "which mentions another to be in force, this shall also "operate as a revival of the last-mentioned statute, as was "the case with the statute of 21 Henry VIIIth, of Plu-"ralities, mentioned to be in force by the Statute of 25 "Henry VIIIth, cap. 21, which was revived by the Statute "of 1 Elizabeth, though that statute says, that no statute "repealed by the 1 & 2 Philip and Mary, cap. 22, shall "be in force if it be not specially revived." So that the rule for which my friends contended yesterday, deducing it from the Statute of 1 Elizabeth, must be received with great qualification, and must be understood, of course, in a very limited sense. Certainly, allowing full scope to what is stated in that statute, still, if the 28 Henry VIIIth, cap. 16, expressly and in terms refers to a particular act, and adopts the propositions stated there as the prohibitions which it imposes,—if it does not give those prohibitions at length, but only refers to them generally, so that it is necessary to recur to the statute to see what they are, then I submit that it is impossible to contend for a moment that the statute so referred to, and so made part and parcel of the other, is not to be considered as revived, when the statute which so refers to it is revived itself.

The same rule, my Lords, is laid down in Comyns's Digest, title, "Parliament, R. 9 A.," where he says, "An "Act which repeals a statute by which another was repealed, "will be a reviver of the statute which was repealed." And, my Lords, taking the course of construction to be as I venture to submit it is, when that Statute of 32 Henry VIIIth, cap. 38, which refers to the Levitical degrees, was itself enacted, both the Statutes of 28 Henry VIIIth, cap. 7, and 28 Henry VIIIth, cap. 16, were in

force; so that if the term "Levitical degrees," which occurs in the statute of 32 Henry VIIIth, cap. 38, is to be construed by any other statutes then in force, as I apprehend it would have to be, then your Lordships see that at that time both the Statutes of 28 Henry VIIIth, cap. 7, and 28 Henry VIIIth, cap. 16, were in force, were statutes in *pari materiâ*, and would have to be construed, and *had* to be construed, and *were* construed, in conjunction with the Statute of 32 Henry VIIIth, cap. 38.

I think, therefore, beyond all question, whatever is particularly stated as the rule or prohibition in the Statute of 28 Henry VIIIth, cap. 7, must be taken to be a prohibition established by law, and fixed in such a manner, that unless there be something expressly to annul it, it must remain in force.

Now, my Lords, there is another point in relation to these statutes, which was referred to yesterday by my friend Mr. Knapp in the course of his argument; and I would submit to your Lordships, notwithstanding the observation which was made to you by my friend, that independently of any question of revival, it may be a question whether that statute of the 28 Henry VIIIth, cap. 7, at least this portion of it, was ever repealed at all, because undoubtedly the 1 & 2 Philip and Mary only repealed so much as was necessary with respect to the papal dispensations. It never could have been the intention of the legislature at that time to repeal those declarations which were contained in 28 Henry VIIIth, cap. 7, because those declarations had always been in direct consistency with the canon law, and with the general body of the ecclesiastical law, both here and upon the continent. It never, therefore, can be presumed for one moment that it was the intention of the legislature to get rid of those parts of the statute which had always been so upheld, and were so enforced by the canon law; but had the declaratory part of 28 Henry VIIIth, cap. 7, been repealed, it seems most probable that it would have been revived by the statute of 1 Elizabeth by name, with the other statutes of Henry VIIIth which were so revived;

because certainly, in the first place, there seems to have been no reason why it should ever have been repealed at all, and, secondly, if it had been repealed, it was most probable that, in the time of the 1st of Elizabeth, it would have been revived; so that, from the negative fact of there being no mention of it in the Statute of 1 Elizabeth, from the nature of the case, and from the great improbability that it should ever have been deemed proper to repeal that part of the statute, it may be contended, and that on very fair grounds (though undoubtedly the question is open to canvass), that that statute was never repealed at all: and it would rather seem that that was the opinion of Chief Justice Vaughan in the case of Hill *v.* Good, which has been so often referred to, because he says, "We must "observe the Act of 1 and 2 Philip & Mary, cap. 8, "doth not repeal this Act entirely of the 28 Henry VIIIth, "cap. 7, but repeals only one clause of it, the words of "which clause of repeal are before cited, and manifest "this second clause of the Act of the 28 Henry VIIIth, "and not the first, to be the clause intended to be re-"pealed. For there was no reason to repeal the clause "declaratory of marriages prohibited by God's law, which "the Church of Rome always acknowledged; nor do the "words of repeal import anything concerning marriages "within degrees prohibited by God's law. But (as the "time then was) there was reason to repeal a clause "enacting all separations of such marriages with which "the Pope had dispensed should remain good against his "authority, and that such marriages with which he had "dispensed, not yet separated, should separate. And the "words of the clause of repeal manifest the second clause "to be intended—viz., 'all that part of the Act made in "the said 28th year of King Henry VIIIth, which con-"cerneth a prohibition to marry within the degrees ex-"pressed in the said Act shall be repealed.'" So that, with reference to that part of the Statute of 28 Henry VIIIth, cap. 7, it seems to have been the opinion of Chief Justice Vaughan that it never had been repealed at all; and consequently, that the prohibitions contained in it (and among those prohibitions there is included, as your Lord-

ships know, the very prohibition of marrying the wife's sister) were never repealed.

But assuming that your Lordships are not of that opinion, and that you do not concur with Chief Justice Vaughan, but think that that statute *was* repealed by the Statute of 1 and 2 Philip & Mary, which does refer to that statute, still I contend, upon the grounds I have already submitted to your Lordships with reference to the revival of the Act of 28 Henry VIIIth, cap. 16, that that statute is clearly revived, and is now distinctly in force. If that be so, the question now before you is at once set at rest. If there is a statute still in force which expressly and in terms declares that a marriage with a wife's sister is plainly "prohibited and detested by the laws of God" (for those are the words which the statute uses); if there is a statute now upon the Statute Book declaring such a marriage to be prohibited and detested by the laws of God, the question is entirely at an end. Your Lordships can go no further. The whole realm is bound by it; and there is then not only a general declaration of prohibited degrees, but a declaration applying particularly to this case, and showing what the mind and intention of the Legislature is.

But, my Lords, my friends say, that that statute *has* been repealed; and I will suppose, though I only suppose it for the sake of argument, that it was repealed. I will also suppose, for the sake of argument, that it has not been revived, and that the Statute of 32 Henry VIIIth, cap. 38, is the only statute to be regarded.

That Statute of 32 Henry VIIIth, cap. 38, is undoubtedly in force. My friends on the other side of course will not contend that it ever has been repealed. Now the words there used are, the "Levitical degrees," and that brings us, of course, to consider what is the meaning of the term "Levitical degrees," when used in that Act by the Legislature.

Now, my Lords, by the term "degrees," I apprehend must be understood "*classes*." It is impossible to contend that those which are merely mentioned, either in the statute, or in the Book of Leviticus (they are the same, indeed, that are specified in each), it is impossible

to contend that by the term "degrees" we are confined to the instances which are there given. It would be doing violence to common sense, and to the fair construction both of the statute and of the Book of Leviticus, so to contend. The term "degree," as my friend Mr. Wallinger has already stated to your Lordships, is a term well known in the law, and therefore the Legislature, when it makes use of that term, must be understood to adopt it in its ordinary and regular sense.

Blackstone, in his Commentaries, vol. ii. p. 203, mentions the different degrees, according to the interpretation of the Civil Law and the Canon Law; and he mentions under distinct heads the number of persons and the various kinds of relations included under each degree. The term "gradus," or "degree," is always understood to comprehend all those who stand in the same proximity, —all that are upon the same platform (if I may use the expression), and resting on the same level with one another. The word "step" itself of course explains it, and shows the meaning of the term. In the works of Cujacius, vol. viii. p. 219, you may find at length the explanation of the word "gradus," and the number of persons who may be considered as coming under the head of the various degrees mentioned and set forth. So that, by the term "degrees" must be understood properly, classes, and all that stand in the same proximity.

And, my Lords, as the statute refers to the Levitical degrees, without defining them fully, we must refer of course to the Book of Leviticus itself, and that brings us to the consideration of what are the degrees contained in Leviticus, and what is the fair interpretation of that Book.

Mr. Justice Erle.—Do you find "Levitical degrees" as a *nomen artis* before the Statute of 32 Henry VIIIth, cap. 38, in our law?

Mr. Badeley.—No, my Lord.

Mr. Justice Erle.—Nor in the Civil Law?

Mr. Badeley.—The first mention we have of it in our law is that Statute of 32 Henry VIIIth.

Now, my Lords, on looking at the Book of Leviticus,

cap. xviii., it does seem to me perfectly clear, that, for the fair construction of that chapter, we must take the general words used at the commencement as being the broad and general rule laid down, and must consider that all the instances which are specified afterwards are put but as illustrations and exemplifications of the general rule, and of course not as limitations of it, so as to prevent or exclude those that are not mentioned. The words, my Lords, in the sixth verse there, are, "None of "you shall approach to any that is near of kin to him, to "uncover their nakedness: I am the Lord." Stronger words could not be used for the purpose of giving a general rule as to all those who are near of kin. That is the 6th verse of the chapter. The chapter itself commences in a way which is quite deserving of your Lordships' consideration, because it is a general command: "And the "Lord spake unto Moses, saying, Speak unto the children "of Israel, and say unto them, I am the Lord your God. "After the doings of the land of Egypt, wherein ye dwelt, "shall ye not do: and after the doings of the land of "Canaan, whither I bring you, shall ye not do: neither "shall ye walk in their ordinances. Ye shall do my "judgments, and keep mine ordinances, to walk therein: I "am the Lord your God. Ye shall therefore keep my "statutes, and my judgments: which if a man do, he shall "live in them: I am the Lord." Then comes the 6th verse: "None of you shall approach unto any that is "near of kin to him, to uncover their nakedness: I am "the Lord." Then it goes on: "The nakedness of thy "father, or the nakedness of thy mother, shalt thou not "uncover: she is thy mother; thou shalt not uncover her "nakedness;" and so on through a great part of the remainder of the chapter. Therefore it would seem, that on a fair, and reasonable, and common-sense construction of that chapter, we must take it that that which is laid down at the commencement is the general rule, and that all that follows is by way of illustration or exemplification only. If, therefore, there are cases which are omitted, but which are undoubtedly near of kin, surely it would be doing violence to the passage in Leviticus itself, if we

did not hold that they were included within it. Take the case of the daughter, the grandmother, the brother's daughter, the sister's daughter—these and several others are omitted in the Book of Leviticus, but according to all the interpretations that have ever been put upon that book, those relations have undoubtedly been held to be included within it.

Now, my Lords, that that construction of the chapter in Leviticus has always been adopted, I think cannot be questioned for a moment. It was so, and is so still, undoubtedly, among the two classes of Jews of whom your Lordships have heard so much, the Talmudists and the Karaites. Although the Talmudists adopted a different rule, and did not apply the text in the same manner as the Karaites did, yet they both adopted an interpretation larger than the sense of Leviticus itself, if confined to the very few words themselves, and the Karaites undoubtedly extended it to the case of the wife's sister. The differences between the two, and how the one class and how the other applied the rules in Leviticus, are mentioned in Selden's *Uxor Hebraica*, lib. i., so that the construction put upon it by those two classes of Jews appears to have carried it further than Leviticus itself carried it. The Karaites always adopted this construction, and always held that a marriage with a wife's sister was included within those prohibitions.

I do not, however, put forward the view either of the Karaites or Talmudists as of any great value in this matter. They were both of a very late date. The Karaites were about the year of our Lord 600; and the Talmud itself, the Babylonian Talmud, which was the most full and most perfect, was not completed until about that period. Some have put it rather later, and some earlier. Whether the Talmudists are looked to, or the Karaites, I do not think it is a matter of much importance, with a view to the construction either of this part of the Book of Leviticus, or of any other part which is called in question before your Lordships.

Now, my Lords, the Canon Law undoubtedly adopted the principle which I have laid down with respect to the

Book of Leviticus. It adopted it as a principle of interpretation. It took the verse which I have referred to, the 6th verse, which says, "None of you shall approach "to any that is near of kin to him," as the principle upon which it legislated; and although the Canon Law may at one period have extended the prohibitions further than was absolutely necessary, or perhaps proper, for abundant caution's sake, it may still be said that that was the principle upon which it went, though a different rule was afterwards adopted by the Council of Lateran.

For the principle which I am venturing now to state, I would refer your Lordships to a volume of a most excellent work of Pothier, *Traité du Contrat de Mariage*, Vol. iii. of the quarto edition, Part III., chap. 3; a very valuable and interesting history is given of the manner in which the prohibitions of the Canon Law were gradually deduced; and he puts it as a well-known thing, and as the general view, and the correct one, that the Canon Law was grounded and based upon the general prohibitions in Leviticus, though he admits that at one or two periods it was carried further than was necessary.

I refer to this, my Lords, merely as showing the principle of interpretation, and the ground upon which the Canon Law went,—that the 6th verse in Leviticus was adopted as giving the general rule, and the others were merely regarded as exemplifications of it, and as given by way of illustration only.

But, my Lords, that has not only been the interpretation put upon it by the Canonists and by the Jews, but it has been the principle of interpretation that has been always adopted and acted upon by the Reformers, by the most celebrated of whom it was adopted in the 16th century. That view was adopted by Beza, by Calvin, and by Luther. In Beza's *Liber de Repudiis et Divortiis*, he adopts that rule. In Calvin's *Institutiones*, lib. iv. cap. 19, and in Luther's book, *De Captivitate Babylonicâ*, the same principle of interpretation is adopted. They regard the rules in Leviticus, not only as binding generally on Christians, but as furnishing the rule or principle on which the prohibitions were founded. A

general summary of all these is given, and very well given, in a work which may, perhaps, be in the possession of your Lordships, the "Controversies" of Bellarmine, who states generally the views of the Reformers of his day, and says of Luther particularly: "Altera sententia " est Lutheri in libro de Captivitate Babylonicâ, edito " anno 1525, Argentinæ, et Martini Buceri in Commen- " tario cap. 19 Matthæi, qui solos gradus cognationis qui " habentur in Levitico cap. 18, ut matrimonii impedi- " menta agnoscunt, cæteros ab Ecclesiâ additos omnino " rejiciunt. Itaque nolunt in gradibus in Levitico ex- " pressis ullo modo licere matrimonia contrahere, neque " ullam admittunt Ecclesiæ dispensationem, cum lex illa " divina sit, non humana, et contra volunt in omnibus " aliis gradibus libere posse contrahi, non obstante hu- " manâ lege vel consuetudine, cum Deus optime noverit " quid prohibendum quidve non prohibendum fuerit."

Then Melancthon's opinion he states thus: "Tertia " sententia est Philippi Melanchthonis in locis, tit. de " conjugio, et Martini Kemnitii in 2 part. Examinis " Concilii Tridentini, p. 1230 et sequentibus, qui con- " veniunt cum Luthero et Bucero, quod præcepta Levitici " circa gradus cognationis naturalem justitiæ normam con- " tineant, et per hoc etiam apud Christianos vim habeant " et omnino immutabilia sint, sed discrepant quoad alios " gradus in Levitico non expressos. Dicunt enim aliquos " alios gradus ab Ecclesiâ antiquâ recte fuisse prohibitos, " et nunc etiam posse prohiberi, modo id fiat servatâ " libertate conscientiæ, id est, ut non sit peccatum in con- " scientiâ si secus fiat."

Speaking of Calvin and Beza, he says: "Deinde affirmat " gradus, qui numerantur in Levitico, jure divino ser- " vandos esse et matrimonia in illis gradibus contracta " esse omnino nulla. Tertio docet non solum gradus illos, " qui expresse habentur in Levitico jure divino servandos " esse, sed etiam eos qui a simili colliguntur. Ut, quia " in Levitico prohibetur conjugium nepotis cum amitâ, " vel materterâ, asserit Beza prohibitum etiam intelligi " debere conjugium patrui, vel avunculi, cum nepte ex " fratre, vel sorore; et quia in Levitico prohibetur con-

" jugium patris cum filiâ, et avi cum nepte, colligit ipse
" prohibita intelligi omnia conjugia in lineâ rectâ, quia
" semper major in lineâ rectâ habet locum patris respectu
" junioris; et eâdem ratione vult esse prohibitum con-
" jugium patrui non solum cum nepte, sed cum pronepte
" etiam, et cum abnepte, et cum omnibus inferioribus.
" Itaque multos gradus jure divino servari jubet, quamvis
" expresse in Levitico non habeantur."

Therefore, my Lords, we have a clear principle of interpretation deduced, not only from the Jews and the Canon Law, but also from the most eminent Reformers, adopting this principle of interpretation, — parity of reasoning,—as the proper construction of the chapter in Leviticus. And, my Lords, I dwell upon this the more now, though I should have thought it otherwise unnecessary to refer to it, because reference has been made to it on more than one occasion, yesterday and to-day; and therefore I have thought it right to put before your Lordships the principle of interpretation which has always been adopted in reference to the Book of Leviticus, in order that there may be no doubt on your Lordships' minds, and that your Lordships may not be under any impression that this is merely a dictum or adjudication of the Canon Law, but that it has been the rule which has been universally adopted, not only by the Romish Church, but by Protestants also.

Mr. Justice Erle.—Were these opinions all given at the time of the controversy in the time of Henry VIIIth?

Mr. Badeley.—No, my Lord; they are opinions given by these writers generally from their works.

Mr. Justice Coleridge.—You say they are collected by Bellarmine?

Mr. Badeley.—Yes, my Lord.

Mr. Justice Erle.—But not with reference to that?

Mr. Badeley.—No, my Lord; it occurs in the Controversies of Bellarmine, de Sacramentis, vol. iii. of the folio edition, page 789.

And, my Lords, in Boëhmer Jus Ecclesiasticum Protestantium, a valuable book, showing the views of the

Canon Law as adopted by Protestant nations on the Continent, vol. iv. page 198, it is said (giving his conclusions generally):—"Ego sic existimo, nuptias Levit. "xviii. non tantum prohibitas esse quoad personas nomi- "natim ibidem expressas, sed etiam quoad eas, quæ sub "prohibitis ex respectu et ratione eâdem eâque evidente "et perspicuâ continentur."

The same thing, my Lords, is laid down with reference to this subject, and its application, in various parts of the Continent, in a most important treatise, Broüwer, *De Jure Connubiorum*, page 507. Speaking of the uncle and the niece, he says: "Dubium non esse potest cum id paritas "rationis urgeat, ex mente divinæ legis vetitum quoque "esse avunculi viduæ cum filio ex mariti sorore conjugium. "Et certe inepte quis argumentaretur in contrarium ex "eo solo quod hujus conjunctionis interdictum non ex- "pressim referat Moses. Avunculi et patrui cum fratris "vel sororis filiâ non expressim interdictæ reperiuntur "nuptiæ; recte tamen ex sententiâ legis vetitæ habentur, "quia materteræ et amitæ cum fratris vel sororis filio "aperte prohibentur. Similis etiam, quæ in consanguini- "tate, in affinitate argumentatio a complexis ad non com- "plexa instituenda est, quoties id suadet rationum pari- "tas." A clearer view of the principle could not, I think, be found, and inasmuch as that view has always been universally adopted, as it would seem, both amongst Protestants, and by the Canon Law, it is almost impossible to contend that that is not the true one.

Your Lordships will find from Bishop Jewell's letter, which has been referred to by my friend Mr. Wallinger, that in this country, among the Reformers, the same rule was adopted as was adopted on the Continent among foreign Reformers. In that letter of Bishop Jewell's, which is to be found in the Appendix to *Strype's Life of Archbishop Parker*, which I dare say your Lordships may have,—vol. iii. the Oxford Edition, page 55,—where that letter is given at length (and portions of it are also given in Burn's Ecclesiastical Law, under the title Marriage), Bishop Jewell says: "Yet will you say, although this "manner of reason be weak, and the words make little

" for you, thus far the reason is good enough; for these " words make not against you; which thing, notwith- " standing I might grant, yet will not this reason follow " of the other side;—there are no express words in the " Levitical Law whereby I am forbidden to marry my " wife's sister; ergo, by the Levitical Law such marriage " is to be accounted lawful. For notwithstanding the " Statutes in that case make relation unto the eighteenth " chapter of Leviticus, as unto a place wherein the degrees " of consanguinity and affinity are touched most at large, " yet you must remember that certain degrees are there " left out untouched, within which, nevertheless, it was " never thought lawful for a man to marry. For example, " there is nothing provided there by express words, but " that a man may marry his grandmother, or his grand- " father's second wife, or the wife of his uncle by his " mother's side. No, nor is there any express prohibition " in all this chapter, but that a man may marry his own " daughter. Yet will no man say that any of these de- " grees may join together in lawful marriage; wherefore " we must needs think that God in that chapter has " especially and namely forbidden certain degrees, not as " leaving all marriages lawful which he had not there " expressly forbidden; but that thereby, as by infallible " precepts, we might be able to rule the rest: as, when " God saith, No man shall marry his mother, we under- " stand that under the name mother is contained both the " grandmother and the grandfather's wife, and that such " marriage is forbidden. And when God commands that " no man shall marry the wife of his uncle by his father's " side, we doubt not but that in the same is included the " wife of the uncle by the mother's side. Thus, you see, " God himself would have us expound one degree by " another."

Now, my Lords, that has been adopted as a principle of interpretation, not merely by ecclesiastics, not merely by Bishop Jewell and the Reformers, but also by our own courts.

I forgot to mention one authority, while speaking of the construction of the Reformers of our own country;

I would direct your Lordships to the *Reformatio Legum Ecclesiasticarum*, referred to by Lord Stowell in the case of Hutchins *v.* Denziloe, in 1 Haggard's Consistory Reports, and stated by him to be "a work of great authority "in determining the practice of those times, whatever "may be its correctness in matters of law." The passage (which will be found in page 45) is: "Hoc tamen in illis "Levitici capitibus diligenter animadvertendum est, "minime ibi omnes non legitimas personas nominatim "explicari. Nam Spiritus Sanctus illas ibi personas evi- "denter et expresse posuit, ex quibus similia spatia "reliquorum graduum et differentiæ inter se facile possint "conjectari et inveniri. Quemadmodum, exempli causâ, "cum filio non datur uxor mater, consequens est ut ne "filia quidem patri conjunx dari potest. Et si patrui non "licet uxorem in matrimonio habere, nec cum avunculi "profecto conjuge nobis nuptiæ concedi possunt." The Reformatio Legum was compiled, as we know, by a body of persons appointed to revise the Canon Law, as existing generally in this country at that time. It never was received generally as law, but, as Lord Stowell says in the case which I have just cited, it shows what was the practice at that time, and that, in the view of those who were then connected with the Ecclesiastical Law of this country, that mode of interpretation was the only mode of interpretation which could be fairly and properly applied to the Book of Leviticus.

There was a decision which was referred to by my friends on the other side, and which was alluded to also this morning by my friend Mr. Wallinger,—the case of Butler *v.* Gastrell, in Gilbert's Reports, in which the principle of interpretation was laid down in this manner by Lord Chief Baron Gilbert. The judgment is to this effect: "And when we consider who are prohibited to "marry by the Levitical Law, we must not only consider "the mere words of the law itself, but what from a just "and fair interpretation may be deduced from it; for the "law in Leviticus, chap. xviii. verse 6, begins, 'None of "you shall approach to any that is near of kin, to uncover "their nakedness.' Now who are next of kin must be

" understood by the examples from the 6th to the 20th " verse. And there are examples of many prohibitions " to collaterals in the third degree, both in affinity and " consanguinity. But there is no example of collaterals " in the fourth degree, either in affinity or consanguinity, " and therefore the law of marriage opens to relations in " the fourth degree. And the Jewish lawgivers, in com- " puting their degrees, computed them according to the " natural order of things, that is, from the propositus " up to the common stock, and so down to the other " relations, which is the fair and natural order of comput- " ing proximity; and in this manner of computation all " marriages of collaterals of the third degree are unlaw- " ful, and all marriages in the fourth degree are lawful." This perfectly agrees with the resolutions of our own law. " Thus the marriage with the wife's sister's daughter is " incestuous, which is the same degree with this marriage." Then he cites Moore, 907; Croke, Elizabeth, 228, and Leonard, 16, Mann's case; and he adds: " So the marriage " with the sister's daughter is declared incestuous, which " is likewise in the third degree. The case of Watkins " *v.* Margatron Raymond, 467. And it was likewise " resolved in the case of Wortley *v.* Watkinson, that the " marriage with the wife's sister's daughter was incest- " uous,—so resolved in the case of Sir Edward Whitpool, " quoted in Hobart, 181; so the marriage of the wife's " sister's daughter was resolved to be incestuous in the " case of Snowlings *v.* Nussey. So the marriage of two " sisters, one after the other, was held incestuous in the " case of Hill and Good, being in the second degree."

So that there you have a distinct decision, a decision of the Court, and of a most able and venerable judge, as to the principle of interpretation to be adopted in looking at the Book of Leviticus, and at the Levitical degrees, as laid down by the statute of 32 Henry VIIIth, that principle of interpretation being, that the 6th verse is to be regarded as the text, that the others are cases which follow from it, and which are to be considered as exemplifications of it.

My Lord Coke adopted the same view, for not only in

the passages which have been read by my friend Mr. Wallinger, but in the Second Institute, page 683, he gives the table of consanguinity and affinity, and who may marry on the one side and on the other. And it is to be borne in mind, that he refers in the marginal note (at least if the marginal note is his) to the degrees, as truly set down in the statutes of Henry VIII. I merely call your Lordships' attention to that, because it seems that either my Lord Coke, or whoever put this marginal note there, seems to have thought that those statutes, or one of them at least, was to be regarded as the ground on which this table was to be drawn up. Then he says at last, "these being the Levitical degrees, which extend "as well to the woman as to the man." "And herein note, "that albeit, the marriage of the nephew cum amitâ et "materterâ is forbidden by the said 18th chapter of "Leviticus, and by express words, the marriage of the "uncle with the niece is not thereby prohibited, yet is the "same prohibited, quia eandem habent rationem propin-"quitatis cum eis qui nominatim prohibentur, et sic de "similibus." There he adopts the principle which I have ventured to submit to your Lordships, as the true principle of interpretation.

Then, my Lords, there is also *Ayliffe's Parergon*, a work of great authority in the Ecclesiastical Courts, where it is laid down in page 369, "the interdicts of marriage and "carnal copulation in the Levitical law were directed to "the man and not to the woman, who are only interdicted "by consequence and implication of law, for the woman "being interdicted to the man, the man must be also inter-"dicted to the woman; since a man cannot marry a woman "and she not marry him." So that there again we have the same doctrine; and we find the same principle of interpretation adopted not only in the authorities to which I have already referred, but in some others also.

There is the case of Clement *v.* Beard, in 5 Modern Reports, page 448, where a marriage with a wife's sister's daughter was held to be incestuous. That case is cited by Lord Chief Baron Comyns in his Reports, page 320. So also, my Lords, in Rennington's case cited by Lord Chief

Baron Comyns, and which is also referred to in Hobart's Reports.

Then there is the case of Ellerton *v.* Gastrel, in Comyns's Reports, page 318. There a marriage with a wife's sister's daughter was held to be incestuous.

Reference is also made to another case, which has been cited to your Lordships, namely, Mann's case, and some others, which I need not refer to again.

There is also the case of Watkinson *v.* Murgatroid, in Sir Thomas Raymond, 464.

There is a case also of Denny *v.* Ashwell, in 1 Strange, page 53, where a marriage with a wife's sister's daughter was held to be prohibited.

In a very late case before your Lordships, the case of the Queen *v.* the Inhabitants of Wye, reported in 7th Adolphus and Ellis, 761, this Court recognized and gave effect to a sentence of the Ecclesiastical Court, annulling a marriage with a brother's daughter, which is not a marriage prohibited in terms by the 18th chapter of Leviticus, though it is by the table of degrees. So that in all these cases the courts of this country seem to have followed the same principle which has been laid down not only by the ecclesiastical authorities and by the canon law, but by the Reformers and jurists here and on the Continent. They have regarded the principle of parity of reasoning, as the proper principle by which to interpret the Book of Leviticus and the Levitical degrees. They have adopted that, and taken it to be the true mode of interpretation; and it would seem almost impossible, my Lords, not to include the case of marriage with the wife's sister in the 6th verse of Leviticus, "None of you shall approach to "any that is near of kin to him, to uncover their naked-"ness." I am informed upon good authority, by some very excellent Hebrew scholars, and I believe the same thing may be found in the works of some of the commentators, that those words are really hardly given in their full meaning and effect in our translation, for that properly the Hebrew translation is that "no man shall approach to" *the flesh of his flesh* "to uncover their nakedness;" using therefore an expression which would seem necessarily to have refer-

ence to that passage in the Book of Genesis, in which it is stated by Moses as having been the declaration of Adam, which was adopted afterwards by our Lord himself, that the man and his wife "are one flesh." If they are "one flesh," (and of course there can be no doubt about that, inasmuch as the words of truth itself have declared so,) then from that intimate union, that identity, as I may say, that there is between a man and his wife, whoever is near of kin to the one is necessarily near of kin to the other: no distinction is drawn between the two. And, my Lords, our own law coincides with that doctrine, for it always treats a man and his wife as one person. The law forbids us to consider them as distinct persons. They are one in every respect; and therefore, whatever is related to the one by blood, must necessarily be related by affinity to the other. Surely therefore the very prohibition laid down in this verse of the 18th chapter of Leviticus, with reference to the brother's wife, furnishes a very strong argument on this subject; because it is said in the 16th verse, "Thou shalt not uncover the nakedness of thy "brother's wife, it is thy brother's nakedness." How can it be so except by marriage? It is only by marriage that it becomes his nakedness at all; and if, therefore, there is any meaning in those words, "it is thy brother's nakedness," surely that must apply with equal force to all who are to be considered on the same footing, or in the same proximity, and must apply to the case of the wife's sister.

I have already referred to the Karaites as adopting that interpretation. It is stated in Selden's "Uxor Hebraica," lib. i. cap. 4, "Adeoque non dubitant Karæi, quin uxoris soror, tam eâ demortuâ quam superstite, in vetitis habenda sit." As I have already said, I do not attach much value to the question between the Talmudists and the Karaites, and the very late interpretations which appear to have been put upon that verse by the Jews.

Your Lordships have been frequently referred to the argument deduced, or supposed to be deduced, from Leviticus, chap. xviii. verse 18: "Neither shalt thou "take a wife to her sister to vex her, to uncover her "nakedness, beside the other in her life time." My friend

Mr. Wallinger has referred to the marginal note of the translators, "or one wife to another." I think it only requires that the verse should be looked at, to see that this forms a much more natural and obvious and sensible interpretation of the verse than that which occurs in the text. The words, "a wife to her sister to vex her," do not seem to carry with them a very obvious meaning. "To take one wife to another to vex her," does seem to be the obvious and natural interpretation; and though the Septuagint appears to adopt the same translation as that in the text, yet it is remarkable that the definition in Schleusner's Lexicon, under the word ἀδελφὴ, is, "Soror, "item propinqua, cognata, consanguinea, popularis ex "eadem gente oriunda, altera item uxor, ac dilecta אֲחוֹת, "quæ vox apud Hebræos æque late patet, Gen. xii. "19. ibid. xx. 12. Soror ex patre sed non ex matre, "semisoror, coll. Lev. xviii. 19, ac xx. 17. Num. xxv. 18, "θυγατέρα ἄρχοντος Μαδιὰμ ἀδελφὴν αὐτῶν, filiam principis "Midian popularem ipsorum. Lev. xviii. 18, γυναῖκα ἐπ' "ἀδελφῇ αὐτῆς οὐ λήψῃ, uxorem ad sororem ejus, h. e. *ad* "*alteram non accipies.* Confer Ezek. iii. 13, ubi Hebr. "אִשָּׁה אֶל־אֲחוֹתָהּ, quod proprie est soror, ad sororem suam, "LXX. reddunt, ἑτέρα πρὸς τὴν ἑτέραν, altera ad alteram." Then he refers to a passage in the Book of Job, and other passages also, as illustrations of the interpretation which he puts upon the word ἀδελφή. That is a work of great authority, and is generally referred to in these matters.

Now, my Lords, it is remarkable that that translation in the margin of our Bibles is also given in the translation of the Bible by Junius and Tremellius, a translation which was made directly from the Hebrew by two of the greatest scholars of their day, and which I believe has been admitted, and still is admitted, upon the continent to be one of the most valuable translations ever made. Dupin refers to it as entitled to very great weight, and it is also referred to by English commentators as of very considerable authority.

Now the translation of the 18th verse, as given in Junius and Tremellius, is, "Item mulierem unam ad al- "teram ne assumito, angustiâ affecturus hanc, retegendo "turpitudinem illius ductæ super hanc in vitâ ipsius."

So that here is a translation corresponding with that given in the margin of our Bible—corresponding with that which Schleusner adopts as the proper one—and which, as I have already stated, seems to make much better sense than the other; and so the verse would not seem to have reference to the marriage of two sisters so much as to polygamy. It would apply to that; and that, my Lords, is the sense in which it has been taken by one of the most able theologians that have ever adorned our country, one of the greatest Hebrew scholars and most excellent of men—Dr. Hammond—one of the best commentators we have ever had, and one of our most learned writers. In the first volume of the folio edition of his works, there is a treatise expressly on this subject—a treatise "*of marrying the wife's sister.*" It occurs at p. 581 of the first volume, and there he undoubtedly adopts this interpretation, for he says, "And if, by the English "reading of our Bible, 'Neither shalt thou take a wife "to her sister to vex her, to uncover her nakedness, "beside the other in her lifetime,' it be thought that the "marrying the wife's sister in her life be the only thing "forbidden, and consequently to marry her after the "wife's death is not forbidden; that will be presently "answered from the margin of our translation, *where the "Hebrew is fitly and truly rendered*, not 'a wife to a "sister,' but 'one wife to another;' and so is a direct "prohibition of polygamy; at least when the first wife is "deprived and vexed by the taking in of the second, as "shall appear in the 'Discourse on Polygamy,' section 7; "but not a permission to marry any that was once pro-"hibited. And that that is the meaning of the place "may be first more generally concluded from the varia-"tion of the style in this from the other verses. The former "interdicts had been given upon the reason of propin-"quity, and accordingly that reason distinctly mentioned "first in general, verse 6, and then pursued in all needful "particulars of it to the end of verse 17. But the inter-"dict here is upon a new reason, that of the vexing, "which is an evidence that the first sort of interdict "(continued for twelve persons) is now quite finished, and

" that another head is begun, against more wives than one; " and accordingly, upon that ensue also divers other new " and particular commands to the end of the chapter." And then he goes on at considerable length to show what the interpretation has been among the Jews upon that subject: he refers to the authority of various commentators, who go along with him, and seem, as I submit to your Lordships, to make out a very strong case to show that the marginal translation in our Bibles is the only proper one.

If your Lordships have Poole's "Synopsis," in the commentary on the 18th verse of the 18th chapter of Leviticus you will find a reference to Hammond, and a reference to the translation by Junius and Tremellius; and that the same opinion was entertained by two other commentators of very considerable learning in their day, and of great celebrity, Ainsworth and Willet. It would, therefore, seem that this verse is intended as a prohibition of polygamy. How far polygamy was allowed among the Jews, how far it existed among them practically, or how far this rule may have been broken through, is a matter as to which we know very little indeed. The course of practice, and whatever has been said about it, have reference to a later period of the Jewish State; and what was actually the practice of the Jews at that time is a matter which we are hardly in a situation to affirm with any thing like positiveness.

Before I dismiss this part of the subject, I must refer your Lordships to another translation which is in great vogue on the continent. In the Vulgate a different translation from either is adopted, for there the words are, "Sororem uxoris tuæ in pellicatum illius non accipies " nec revelabis turpitudinem ejus adhuc illâ vivente." There, therefore, it would seem to be a prohibition against concubinage, against the adoption of a second wife as a wife of inferior degree, or inferior kind, as we know was the practice amongst the Jews at one time. It would seem to be a prohibition against taking the sister during her life into a state of concubinage, so as to make her a concubine wife; and the rule must be limited by

the period with respect to which it makes the provision; namely, the life of the other. Supposing the translation in the margin is not adopted, and that the one which has been already referred to by my friends on the other side is to be considered as the proper one, it may be asked, How is it that, if a marriage with a wife's sister was sufficiently provided for already, this should have occurred at all? that is, supposing the translation which is the ordinary translation to be the one to be adopted. Now I think it may be said, that there might be very good reason for imposing or putting the second prohibition, notwithstanding that the prohibitions contained in the previous part of the chapter preclude or forbid the marriage. We know that among the Jews one or two instances had occurred,—one the instance of a most distinguished patriarch (Jacob); and therefore, in order to prevent the Jews from being misled under any circumstances by reference to so great an example as his, it may be supposed that there might be a reason for introducing an express provision with respect to two sisters. Considering the high veneration which the Jews entertained for their patriarchs, the prohibition, as it now stands, might have been added in order to prevent an inference to the contrary being drawn from the history of the patriarch himself.

My friend Mr. Wallinger has called your Lordships' attention to the interpretation put upon this passage by Bishop Patrick, and though that writer does not adopt the translation referred to as the preferable one, yet he gives an interpretation of that verse distinct from that which is put upon it by my friends on the other side, and considers that the whole of that chapter taken together, and the different verses referred to, distinctly negative the right of any person to marry his wife's sister; that this is expressly prohibited, and that the 18th verse cannot be used for the purpose to which it is sought to be applied by my friends opposite.

I think I may venture to submit to your Lordships, that the authorities on this subject which I have cited, and which I might cite to a much greater extent, are of

more weight, value, and importance, than those which have been brought forward on the other side.

You have had cited before you the authority of Michaelis, and the authority of Bishop Kidder; I do not think that Bishop Kidder's Commentary is one that is very much esteemed, or considered of much value among the writers of our own Church. As to Michaelis, he was a learned man, and my friends have the benefit of his authority. I do not mean to contend that that verse has not been questioned, but still I submit that, if the principle of interpretation with respect to the book of Leviticus is clearly laid down, and deducible from the former verses of the chapter, and if the other part of the chapter of Leviticus does clearly show that the marriage with the wife's sister is contrary to the spirit of what has gone before, that the verse which follows, however doubtful in its interpretation, nay, however doubtful even in its true translation, cannot possibly be allowed to contravene that which is in direct accordance with the previous interpretation given to the preceding part of the chapter.

Then, my Lords, I would suggest, that in a case of doubt, considering the awful sanctions under which these prohibitions in Leviticus were promulgated, it must be the part of prudence, as well as of piety, to adopt the safer and stricter interpretation of these prohibitions, rather than the more enlarged and extensive one. The words which follow these prohibitions are words certainly of the most serious and awful import: "Defile not ye "yourselves *in any of these things:* for in all these the "nations are defiled which I cast out before you: and the "land is defiled: therefore I do visit the iniquity thereof "upon it, and the land itself vomiteth out her inha- "bitants. Ye shall therefore keep my statutes and my "judgments, and shall not commit *any of these abomi-* "*nations;* neither any of your own nation, nor any stranger "that sojourneth among you: (for all these abominations "have the men of the land done, which were before you, "and the land is defiled;) that the land spue not you out "also, when ye defile it, as it spued out the nations that

"were before you. For whosoever shall commit any of "these abominations, even the souls that commit them "shall be cut off from among their people." It would seem, therefore, that the intention was, that these prohibitions should extend to the whole human race, as they have been interpreted in all ages. How could "the land" have been "defiled," so as to render the inhabitants deserving of the visitation they received, unless these prohibitions had been binding upon them—unless they had been part of the original law of God, given by God in the first instance, and handed down by tradition? It would seem, therefore, if there is any weight at all to be attached to these prohibitions, prudence and piety also would dictate that, if there is any doubt or question about them, your Lordships should adopt the stricter sense, and not extend them beyond what their fair interpretation warrants.

I have already referred your Lordships to the *Traité du Contrat de Mariage*, of Pothier; in a subsequent passage to that which I have cited, he seems to consider, with the rest of the principal writers upon this subject, that these prohibitions are binding generally—that they are binding upon the whole human race—that from the earliest periods of Christianity this opinion has prevailed, and although in interpreting them we are not to carry them further than the words will fairly warrant, yet where a prohibition is distinctly to be collected, that prohibition is to be strictly adhered to, and that an opposite construction, derived from a verse of an uncertain character, cannot and ought not to be allowed. That is in the 3rd chapter of Pothier. Such was also the opinion of Luther, Melancthon, and Calvin, at the time of the Reformation.

Then, my Lords, assuming that there is a doubt (and I admit that there may be a doubt upon the true construction of that 18th verse), how has it been disposed of in our own country, and by our own authorities? I shall not weary your Lordships by drawing your attention again at length to the books and cases which have been already cited, but in Hill *v.* Good that very point

was raised and suggested, and it was raised and suggested, my Lords, only to be at once disposed of and rejected. It was expressly stated, by Lord Chief Justice Vaughan (at p. 302), who treats it as of no value at all. It would seem, therefore, that the very doubt arising upon the 18th verse has been distinctly brought before the courts of this country, and that when it was brought before them, it was disallowed; and I think I am justified in contending, that it is not now entitled to be considered as a point deserving of any weight.

But, my Lords, is that the only decision on the point? By no means; we have the authority of Bishop Jewell, as adduced by my friend Mr. Wallinger. You have also the case of Harris *v.* Hicks, which has been already cited, and which is 2 Salkeld. There the marriage with a wife's sister was deemed incestuous.

In addition to that case, there is also a case in Sir Thomas Jones's Reports, Collet's case, page 213. I will trouble your Lordships with that case. "A prohibition "was prayed to the Dean of the Arches, on a suggestion "that Collet had settled his lands in remainder, after his "death, on his children, by his wife now living, and that "there was a suit there to divorce him from his wife, on "pretence that their marriage was incestuous, because "this wife was the sister of his former wife, now dead; "and by this suit, in consequence, the children would be "bastardized, and their inheritance drawn in question in "a spiritual court. This matter came again in debate "this term, on a day given to show cause why a prohibi-"tion should not be granted; and *per curiam*, no prohi-"bition ought to issue, for on such pretence every "incestuous marriage might be sheltered; and this mar-"riage lying properly within the spiritual jurisdiction, "the consequence possibly following to the temporal "inheritance shall not take it away."

The court were informed that there was some collusion between the parties, and therefore suggested a trial at law, in a feigned issue, and so the matter was stayed in consequence of that suggestion.

That case is also referred to in Skinner's Reports,

page 37. The same point was moved again, and the court advised them to try, in a feigned issue, whether the father was ever married to his wife's sister; supposing that if he had been, the marriage was incestuous, and therefore void. There again we have a fresh declaration, and an additional proof that such doubts as those raised on the 18th verse of the 18th chapter of Leviticus have no operation here.

In *Ayliffe's Parergon*, page 64, this is stated, "For a "man to marry his wife's sister, though she be not in the "right line, ascending or descending, is a marriage expressly "forbidden by the Levitical law." That is a book which is always referred to by Lord Stowell as an authority of great weight.

There is one other decision which I think has not been referred to, but to which I beg leave to call your Lordships' attention. It is a decision of Lord Hardwicke's, in a case before him which is reported under the name of Brownsword *v.* Edwards, in 2 Vesey sen., page 243. The question arose on a demurrer as to whether the parties should be compelled to disclose circumstance on a bill of discovery as to a marriage, which would subject one of the parties to punishment in the Ecclesiastical Court, the other being dead; and Edwards, the defendant, put in a plea that she was not bound to answer on this ground. She averred by her plea, that the testator was before married to her own sister, by whom he had children, who survived him, and consequently if she was married to him afterwards, it would be an incestuous marriage, contrary to law, and subject her to the penalties and punishments the law inflicts on such a crime. Then the demurrer was argued, and the Lord Chancellor, after referring to the case of Hicks *v.* Harris, in 2 Salkeld, says this: "I always took the distinction to be what is "laid down in Hicks *v.* Harris, that by the law of the land "the Ecclesiastical Court cannot proceed to judge of "the marriage, and to pronounce sentence of nullity, "after the death of one of the married parties, especially "where there is issue, because it tends to bastardize the

" issue, and none after death of one of the parties to " that marriage is to be bastardized; but there is no rule " of law standing to prevent either of the parties from " punishment after death of the other. Then (he says) " why may not the Ecclesiastical Court do it in the case " of incest, whether without the formality of marriage, or " attended with it? But it is said, Hicks *v.* Harris is no " judicial determination in the point, and that all that was " material before the court was the point of jurisdiction; " which is true; but there was a plain difference. If the " court held that the proceeding (and this is an answer " to one part of the objection) even for the censure " against the surviving party, would have tended to " affect the legitimacy of the marriage or the issue, the " Court of B. R. would have stopped there; but they " went on this, that it could not be given in evidence " against the issue or the plaintiff claiming under that " issue." Then he goes on to refer to Hicks *v.* Harris again, and affirms the judgment in that case, affirming throughout the rule and principle that a marriage of this sort is an incestuous marriage, and is contrary to the Levitical degrees; so that here (including those cited by my friend Mr. Wallinger) you have a current of authorities all one way, and not one of them expressing any question upon the matter. I consider, therefore, that any doubt that could be supposed to arise on that 18th verse of the 18th chapter of Leviticus, has been already disposed of in such a way after the decisions which have been come to upon it in this court and elsewhere, that it cannot now be considered as a point which is open to canvass.

Before I dismiss this part of the subject, I would refer your Lordships to Pothier again. In 1 *Traité du Contrat de Mariage*, in the 3rd vol. page 201, he treats of the rules both in the civil law (as far as they were adopted there), and in the canon law, as derived from that general precept in Leviticus, and seems to discard everything which could be considered as raising a doubt upon the extent or effect of the prohibitions contained in any portion of the chapter of Leviticus.

There is also an authority to the same effect in the works of one of the best and most approved writers upon the civil law, who goes a great deal into the subject of the canon law also. Vinnius, in his *Commentary on the Institutions*, in page 63, book 1st, title x., says: "Cognationis simulacrum quoddam est affinitas, cujus ea "etiam vis est, ut quosvis affines quibusvis jungi naturæ "honestas non patiatur; sunt autem affines viri et mu- "lieris cognati dicti ab eo, quod duæ cognationes, quæ "inter se diversæ sunt, per nuptias copulantur et altera "ad alterius cognationis finem accedit, οἱ κατ' ἐπιγαμίαν "συγγενεῖς, *l.* 4, *s.* 3, *de grad. et affin.*, ubi nomina quoque "affinium peculiaria recensentur." Then he proceeds to show the degrees of affinity and consanguinity, and he afterwards says: "In lineâ transversâ æquali neque frater "uxorem defuncti fratris ducere, nec vicissim soror "marito sororis nubere potest; nec maritus cum sorore "uxoris, aut uxor cum fratre mariti conjungi, quoniam "affinitate inter se sunt facti fratres et sorores, *l.* 5, *l. pen.* "*et ult. C. de inc. nupt.*, facit. *d. c. Levit.* 18. *ver.* 16; "quo loco cum fratris cum uxore fratris defuncti nuptiæ "prohibeantur, prohibita quoque censeri debet sororis "cum marito sororis suæ conjunctio, ex ratione, quam "affert Moses, quia, inquit, fratris tui pudenda sunt, "quod nihil aliud declarat quam quia uxor fratris tui "est, ut jam affinitate tu illi frater, illa tibi soror facta "sit, quos conjungi naturæ honestas non patitur." Afterwards he says: "At enimvero si in universum spec- "tamus, causam ob quam nuptiæ in prædictis omnibus "affinitatis gradibus prohibentur, videlicet quia vir et "uxor in unum corpus coalescentes non 'amplius duo "sunt sed una caro;' in universum dicendum videtur "eosdem gradus affinitatis prohibitos censeri debere "qui prohibiti sunt in cognatione: et propositionem il- "lam, Levit. xviii. 6, *ad proximam sanguinis sui nemo* "*accedat*, etiam ad affines, qui pro consanguineis sunt, "pertinere, et tam late patere quam late patet pro- "hibitio inter sanguine junctos." Then he goes on, amplifying upon this, and clearly adopting the general interpretation, as if there was no doubt at all that the

true construction was that a wife's sister was included in the prohibition in Leviticus.

It seems to me, therefore, my Lords, that looking at the case in this manner, construing it according to the terms of the Levitical degrees, adopting that which is the fair and reasonable interpretation of the book of Leviticus, that principle of interpretation which has been always adopted, that principle which has been adopted here and in other countries generally, not only wherever the canon law, but where Protestantism has prevailed, your Lordships cannot entertain a doubt as to what your decision should be upon this question. By decisions of our own courts that principle has over and over again been affirmed. The doubt raised on the other side has been uniformly dismissed, and you have one continued course and current of authorities coming down from very early periods to the present time, all showing that a marriage with a wife's sister is illegal, without one single authority the other way; because Mann's case and Parson's case are both disposed of; I say Parson's case and Mann's case do not affect the question at all. They are, I believe, both consistent with my view, and not with the view of my learned friends! It is expressly stated in the note to Coke Littleton, in Hargreave's Edition, that, in that case of Parson's, consultation was granted two years after the decision mentioned by Lord Coke; and with respect to Mann's case, we have the decision which is given in Croke, to which your Lordships' attention has already been called, and there seems perfect reason to believe that in that case the prohibition was not granted; or, if granted in the first instance (as may be consistent with the case as reported by Moore), still in the later report of it given by Croke, which is more full and complete, it appears to be beyond all doubt, that the consultation was awarded and the prohibition refused.

Taking it, therefore, that the prohibited degrees are to be regarded in the same light as the Levitical degrees, that the term "prohibited degrees," in 5 and 6 Wm. IV. means, in fact, the same as the words "Levitical degrees"

in the statute of 32 Henry VIII. cap. 38, then, I think, there can be no doubt, that by the course of interpretation, by the invalidity of any doubt that has been raised upon it, and by the uniform current of decisions, a marriage with a wife's sister must be deemed to be included within the degrees prohibited by the statutes; and if the principle of interpretation which has been handed down from one age to another is the true one, then no doubt can be raised which can have any weight with your Lordships, and the arguments of my friends opposite, by which it seems to me the question has been rather perplexed than otherwise, must be disregarded.

Now, my Lords, before I pass on to the Ecclesiastical part of the subject, it may be proper for me to notice the argument which has been so much urged by the other side, the argument arising from the statute of the 1st of Queen Mary. I think it may be a question whether that statute of the 1st of Queen Mary is not virtually repealed by the statute of the 1st of Elizabeth; I mean that statute which revived the several statutes of Henry VIII., to which reference has already been made. The 1st of Elizabeth revives the statute of 28th Henry VIII. cap. 16; it revives, therefore, all that is said there against dispensations, and bulls, and authorities from Rome. It may be questioned (and the doubt has been felt more than once), whether by the revival of that statute of Henry VIII., which in such express terms annuls all dispensations and bulls from Rome, the marriage between Henry VIII. and Queen Katharine, which was referred to in the 1st of Mary, must not be regarded as a bad marriage. It is a well-known matter of history, that that marriage was obtained by a papal dispensation. Although it is not referred to in the statute of Queen Mary, it is a matter of historical notoriety, that the marriage of Katharine of Arragon with Henry VIII. was grounded on a papal dispensation. If, therefore, the statute of Elizabeth revived that statute of 28 Henry VIII., it would seem to have a strong bearing on the statute of Mary, and therefore on the marriage referred to in that statute, which was undoubtedly obtained under

a papal dispensation. It may also be contended that that statute of 1st Elizabeth, which so revived the 28th of Henry VIII. cap. 16, must also on another ground be taken to have done away with the statute of Mary, because if I am right in the argument which I have already ventured to submit to your Lordships, if I am right in assuming that the statute of 28th Henry VIII. cap. 16, incorporates that portion of 28th Henry VIII. cap. 7, in such a manner as to make it necessary to refer to that statute to give due effect to the other, if the effect of that statute is to make the prohibitions contained in 28th Henry VIII. cap. 7, part and parcel of 28th Henry VIII. cap. 16, and so now in force, then I submit the statute of 1 Elizabeth, reviving it, must be considered as negativing and declaring unlawful, and contrary to God's law, the marriage of the brother with the brother's wife, which was the case of Henry VIII. and Queen Katharine; so that upon that ground, if the case rested there, I should contend that there was good ground for saying that the statute of 1 Mary is of no value at all, being entirely superseded by the revival, under the statute of the 1st of Elizabeth, of the 28th of Henry VIII. cap. 16, and that portion of 28th Henry VIII. cap. 7, which applies to prohibitions of this kind.

But, my Lords, I do not rest there. It seems to me to be idle to contend for a moment that that statute of the 1st of Mary can have anything to do with this matter. If it proves anything it proves too much, because no pretence can be set up at all for saying that the particular marriage, or the particular kind of marriage, referred to in that Act, namely, the marriage of a man with his brother's widow, was ever considered by the law of this country as being legalized under that Act. I challenge my friends on the other side to produce a single instance in which, in any case, in any court in this country, a marriage with a brother's wife has ever been deemed a valid marriage. If my friends are right in their contention, how is it that this statute, which was passed for the express purpose of affirming a marriage between a brother and his brother's wife, has never been

extended further than the very case mentioned in it, and that it is only now sought by parity of reasoning to make it apply generally? My friends' argument is new in its character, and, as I think, new in its effects. It seems to me not only to be a most illegal, but a most illogical argument. The effect of it would be to make a statute, passed for a particular purpose, applicable to another purpose which cannot be held to be within it. Surely, my Lords, to say that that statute is to apply to all marriages *in pari gradu*, would be the most extraordinary construction to put upon the statute that one has ever heard of.

Then, my Lords, look at the statute itself. Nothing can be more guarded than the terms of it. Nothing can be more express or more limited than it is in every part and parcel of it. Nothing is said as to any other marriage, nor is there any allusion whatever to any other individual under the sun, and therefore to extend it further, and to say that such marriages were to be valid generally, would be utterly inconsistent with any construction that could by the common intendment of words be put upon that statute.

And, my Lords, why is the statute to be extended further? If it be particular and precise in its terms, as we know it to be, and if it applies to a particular case only, then I apprehend, according to the true construction of statutes, no inference can be drawn from it which can make it general.

Upon this point I would refer your Lordships to an authority in Viner's Abridgment, title "Statutes," where he says, "Acts general in words have been construed to "be particular, where the intent was particular." And, in another place, referring to the case of the College of Physicians *v.* Butler, in Littleton's Reports, page 247, Viner says, "Particular statutes shall not go beyond the "words, but general words which are for the benefit of the "commonwealth shall be construed largely, and by equity." This is clearly in its terms "a particular statute." It is made to meet a particular case. It is confined in its terms throughout to that particular case, and whatever

my friends may contend with reference to the construction of the preamble, (and I submit there is no pretence for their argument as to that, according to the fair sense of the words used,) nothing can be said about the enacting part which should induce your Lordships to carry it one iota further than the particular case to which it was intended to apply.

Then, my Lords, if it was a private or particular Act, I apprehend it is open to us to look at the grounds upon which it was framed; and although in the statute itself no reference is made to the fact of the marriage being by a papal dispensation, we know historically that it was so, and that is a material clue to the proper understanding of the statute. Although the papal dispensation is not mentioned in the statute, certainly the legislature of Queen Mary, and Queen Mary herself, would be the last to gainsay the papal dispensation, or its authority in such matters. It never, therefore, could have been the intention of the legislature to exclude the papal dispensation, which was the basis of this marriage, or to treat it as of no value.

As to what is alleged also with reference to the marriage between Queen Katharine and Prince Arthur having been consummated, how far we are to give credit to that I do not know. There are statements of particular facts which would appear to lead to such an inference, but other statements of historians are inconsistent with them; and we know that the consummation of that marriage has been disputed, and that it has been most distinctly denied. The fact, I believe, is, that the marriage was not consummated. It was most solemnly asserted by the Queen that it never had been consummated, and Henry VIIIth admitted this to Cardinal Pole.

Mr. Justice Erle.—Is it recited that the marriage had been consummated between Arthur and Katharine?

Mr. Badeley.—I believe it is, my Lord.

Mr. Justice Erle.—It was the great fact against Queen Mary?

Mr. Badeley.—It was stated in the proceedings against

the queen, which still exist; she declared most distinctly, and always affirmed to the last, that the marriage with Prince Arthur had never been consummated, and therefore that the papal dispensation was correctly given; and Henry himself admitted it, and was reminded of it by Cardinal Pole.

Mr. Justice Erle.—The only question is, whether it is in the recital in the statute?

Mr. Knapp.—Yes, my Lord, it is in the 7th Section.

Mr. Badeley.—However, we know historically that the marriage was had under a papal dispensation, and that Queen Mary would have been the last person to gainsay the effect of that dispensation.

But, my Lords, whatever may be the state of the case with reference to that statute, it is clear, beyond all question, that that statute is entirely annulled, both in form and in effect, by the statute of 1 Eliz. cap. 3,—the Act which recognized Elizabeth's title to the throne. That statute says, in the most abject manner, to the queen, "There is nothing that we your said subjects for "our parts can, may, or ought towards your highness "more firmly, entirely, and assuredly in the purity of our "hearts think, or with our mouths declare and confess to "be true, than that your majesty, our said sovereign "lady, is, and in very deed, and of most mere right ought "to be, by the law of God and the laws and statutes of "this realm, our most rightful and lawful sovereign liege "lady and queen; and that your highness is rightly, "lineally, and lawfully descended and come of the blood "royal of this realm of England, in and to whose princely "persons, and the heirs of your body lawfully to be be-"gotten after you without all doubt, ambiguity, scruple, "or question, the imperial and royal estate, place, crown, "and dignity of this realm, with all honours, styles, "titles, dignities, royalties, jurisdictions, and pre-eminences "to the same now belonging and appertaining, are and "shall be most fully, rightfully, really, and entirely in-"vested and incorporated, united and annexed." Now, if Queen Elizabeth was "rightly, lineally, and lawfully "descended, and come of the blood royal of this realm of

" England," then Queen Mary was not, because if Henry's marriage with Anne Boleyn (of which marriage Queen Elizabeth was the issue) was a good marriage, then his marriage with Queen Katharine was a bad one; and therefore that at once would dispose of the statute of the 1st of Mary, which has been so often referred to. If the marriage of King Henry and Queen Katharine was good, then the marriage of King Henry and Queen Anne Boleyn was bad.

LORD DENMAN.—They were both recognized by Parliament?

MR. BADELEY.—Yes, my Lord.

LORD DENMAN.—It did not at all disturb their faith in the notion that Queen Mary was the rightful sovereign?

MR. BADELEY.—No, my Lord; but I would submit that the effect of that Statute of 1 Eliz. cap. 3, which not merely recognizes her as the rightful sovereign of the kingdom, but speaks of her being " rightfully, lawfully, " and lineally descended and come from the blood royal " of England," is inconsistent with the declaration in the statute of Mary. If the one marriage was good, and if Queen Elizabeth " was and ought to be by the laws of " God and by the laws and statutes of this realm the " most rightful and lawful Queen of England," then Queen Mary could not be regarded in the same light. Those two statutes, therefore, are inconsistent with each other; and if they are, then the latter statute, viz. that of Elizabeth, must prevail, and the other statute (the statute of Mary) must fall to the ground.

Looking, therefore, at the statute of Mary as a statute which may be deemed to have been altogether repealed by the statute of 1 Eliz., to which I have referred, or looking at it independently of that, and with reference simply to what it states,—that it is merely a provision with respect to that particular marriage, and that it cannot be extended any further,—looking at the circumstances under which that statute was passed,—looking also at the proper interpretation of it, and at the fact that even that statute never yet has been carried beyond that particular marriage, so as to legalize any of those

marriages which are of the same nature as that referred to in the Act,—looking also at the inconsistency of that statute with the terms in which the descent of Queen Elizabeth is stated in the Act of 1 Eliz. cap. 3,—it seems to me that the Statute of 1 Mary cannot be allowed to operate. It is an act which is private in its nature, particular and guarded in its provisions, and closely confined to the subject-matter of the particular marriage to which it relates. It has never been attempted to be carried further, or to be used in any court of justice, as legalizing marriages with the brother's wife (which marriages, it must be borne in mind, are distinctly and in terms prohibited in the Book of Leviticus); therefore, if it proves anything at all, it proves too much, because it goes to legalize marriages expressly prohibited in the Book of Leviticus.

It appears to me, my Lords, that I should be only wasting your Lordships' time if I were to allow myself to dwell at greater length upon this portion of the subject; and having now, therefore, disposed of that part which relates to the statutes, I will proceed, as shortly as I can, to put your Lordships in possession of that which belongs more particularly to the Ecclesiastical Law.

Lord Denman.—We can hardly enter upon any other head of argument to-day. The court will not sit again until after the trial at bar, which is fixed for Monday and Tuesday next.

Sir F. Kelly.—Will your Lordships proceed with this case on Wednesday week?

Lord Denman.—Yes; on Wednesday week we shall sit if that trial is over.

COURT OF QUEEN'S BENCH,

June 30th, 1847.

ARGUMENT CONTINUED.

MR. BADELEY.—My Lords, when I had the honour of appearing before your Lordships in this case, on a former occasion, I ventured to submit to the court, that the Statute of 5 and 6 William IVth, cap. 54, inasmuch as it refers generally to the "prohibited degrees of consan-"guinity and affinity," must be taken to mean some general standard, some degrees the prohibition of which is perfectly understood or easily ascertainable, and that by the term "prohibited," must be understood something prohibited by law, either by statute law, or by the common law, or by the ecclesiastical law.

I drew your Lordships' attention, in the first instance, to the question under the statute law, and I contended that the Statute of 28 Henry VIIIth, cap. 7, which refers in terms to the prohibitions of the Levitical law, and expressly includes within them the marriage with a deceased wife's sister, declaring such marriage to be "plainly detested and prohibited by God's law," is a statute still in force, having, as is most probable, never been repealed by the Statute of 1 & 2 Philip and Mary, or, if repealed by that statute, undoubtedly revived by the Statute of 28 Henry VIIIth, cap. 16, which refers, in the most distinct manner, to the Statute of 28 Henry VIIIth, cap. 7, and incorporates its provisions with respect to the prohibitions of marriage.

I therefore submitted to the court that that statute must be regarded as being, and that it is in fact, decisive, as an authority upon this point.

But, my Lords, in order not to rest satisfied with that, as my friends had contended that that statute had been

repealed, though the case of Hill *v.* Good seemed distinctly to say that it had not, I took the case as if it stood solely upon the Statute of 32 Henry VIIIth, cap. 38, and I endeavoured to prove that by the term "Levitical "degrees" as used in that statute, must be understood all those cases of marriage which are brought by parity of reason within the rule and principle of the cases in the 18th chapter of Leviticus; I showed that the principle of parity of reason, which had been objected to on the other side, was the only principle upon which the chapter of Leviticus could be properly interpreted, and that that was the principle adopted not only by the canonists in forming their rules of prohibitions of marriage, but also by the Reformers, upon the continent, as well as in this country, and that it had been the principle adopted by the courts of this country, both the courts of common law, and the ecclesiastical courts, they having, in repeated instances, annulled marriages upon the score of incest, as being contrary to the Levitical degrees, those marriages not being in express terms mentioned in the 18th chapter of Leviticus, but being only brought into it by parity of reason; I thus proved what was *the principle of interpretation* to be applied to the term "Levitical degrees" in 32 Henry VIIIth, cap. 38, and to the chapter of Leviticus as made a necessary part of that statute.

I then went on to show, that the case of a marriage with a wife's sister was distinctly and undoubtedly included within those prohibitions. I showed it from the language of the Book of Leviticus itself, from the interpretations which had been put upon it generally both on the continent and in this country, and that there were numerous decisions of the courts of this country which had always regularly treated such marriages as prohibited; I met the objection which had been raised on the other side, arising from the 18th verse of the 18th chapter of Leviticus, and urged that that verse did not at all interfere with the general principle of interpretation adopted from the previous part of the chapter, and that that verse is not only capable of another interpretation, but that it is more properly interpreted as a

prohibition of polygamy, and I showed that that was the view not only adopted by our own translators in the margin of our Bibles, but that it was also adopted in other translations of undoubted weight and authority, and by the opinions of some of the most able and distinguished Biblical and Hebrew scholars in this country and abroad, and I submitted that, if there should be unfortunately a doubt on the true construction of that verse, so questionable in itself, both in its proper translation and as to the real meaning of it, it could not be allowed to interfere with the general principle of interpretation applied to the chapter of Leviticus generally, but that of course a marriage with a wife's sister, if the principle of parity of reason held, must be held necessarily to be forbidden; I showed that the doubt which had been so raised had been actually considered in the case of Hill *v.* Good, and that it was considered in order to be rejected, and that the cases which followed had affirmed the case of Hill *v.* Good, and adopted the view taken by the court in that case; and thus I proved that there was an undoubted current of authority affirming the marriage of a wife's sister to be included within the term "Levi-"tical degrees," and therefore within the Statute of 32 Henry VIIIth, cap. 38.

I then, my Lords, met the question with reference to the Statute of 1 Mary, and endeavoured to show, that that statute, recognizing the marriage between King Henry VIIIth and Queen Katharine as a marriage according to God's law, could not be allowed to interfere with this principle—that it could not apply at all to this case—that it was a mere private and particular statute, the operation of which was intended to be confined expressly and in terms to that particular case—that it could not be extended further on the true principle of interpretation of statutes, and that it never had been attempted to be applied even to legalizing any marriage similar to that to which it distinctly related, namely, the marriage with a brother's wife; and therefore, if it had never been thought of as legalizing a marriage with the brother's widow, to which alone it referred, it cer-

tainly could not be intended to apply to another marriage, such as that with a deceased wife's sister, which was not included directly or indirectly in that statute; and I ventured to contend, that that Statute of 1 Mary was entirely inconsistent, not only with the statutes of Henry VIIIth revived by the 1st Elizabeth, (those statutes being against the papal dispensations, and distinctly showing a marriage with a wife's sister to be prohibited by the law of God,) but that it was also inconsistent with that Statute of 1 Elizabeth which recognized her title to the crown, as being born rightfully and lawfully of the blood royal of England; I therefore contended that the statute of Queen Mary was of no force, and that it could not be allowed to interfere with that to which it was not in terms or by proper inference in any way applicable.

Having thus met the case as it stood upon the statutes, I was proceeding to address myself more particularly to the question as connected with the ecclesiastical law, and to that I now propose to draw your Lordships' attention; and, my Lords, I deem this the more important, because, as the Statute of William IV. refers in distinct terms to the practice of the ecclesiastical courts as regulating and determining matters connected with the validity of marriages, it is plain that the legislature must have intended to adopt the rules laid down by the ecclesiastical courts in those matters, and therefore, that whatever is found to be the ecclesiastical law of the land, must be understood to be affirmed by that statute which has been so passed by the legislature.

To that view of the question I may have occasion to recur hereafter, and I will now proceed to consider how the ecclesiastical law of this country stands upon this subject.

But, my Lords, before I do so more particularly, it may be proper for me to advert shortly to a case which has been cited with an air of triumph by my friends on the other side, as if it entirely disposed of the question in its connexion with the ecclesiastical law—namely, the case of Middleton *v.* Croft, which is reported in the *Cases in*

the time of Lord Hardwicke, p. 326, and in 2 Strange, p. 1056. The position which was cited by my learned friends on the other side from that case—namely, that a canon, whether of 1603, or an earlier canon, a canon merely passed by Convocation, and not adopted by the legislature, or enforced by Act of Parliament, was not binding on the laity, though it would be upon the clergy. My friends seemed to suppose that that case almost disposed of this question as it respected the canons generally, and certainly that it disposed of it as far as the canons of 1603 were concerned. I deny that position, and I think my friends are mistaken in supposing that the case of Middleton and Croft is in their favour. If it were necessary to see how far that doctrine of Lord Hardwicke, namely, that a canon not affirmed by the legislature, though binding upon the clergy, is not binding upon the laity; if it was really necessary to consider that point, with reference to this case, I should most humbly and respectfully call your Lordships' attention to it, and request that that point should be reconsidered, because I think it is open to very great doubt. The point, as it arose, was really immaterial in the case of Middleton and Croft. It was not connected with the facts of that case; it was not necessary for the decision of that case; and it was not the point upon which the case was decided. For the question in Middleton and Croft turned upon this, whether a canon *in affirmance of the ancient law of the country* was in itself binding upon the laity; and secondly, whether a canon so made was interfered with by a statute which had been passed subsequently, relating to the same subject-matter. Those were the points really in issue in Middleton and Croft, and the point really decided there was, that a canon in affirmance of the ancient law was binding on the laity.

The point, therefore, for which my friends on the other side cited that case was really extra-judicial, because it was not the point upon which the case turned; and most undoubtedly, though I freely admit that the point so stated by Lord Hardwicke had been laid down by one or two other judges of very great note before, yet there were

decisions the other way, and decisions of judges of equal celebrity and equal character with those who had asserted the position laid down by Lord Hardwicke; and Lord Hardwicke certainly, in noticing those cases, disposed of them in a very summary manner; and one particularly, which was most important, he disposed of by merely saying that "it was an extraordinary case." The case to which I refer, as being thus incidentally under Lord Hardwicke's consideration, was a case in Moore, the case of Bird and Smith, and there the resolution, as stated in the case, is this.

Mr. Justice Coleridge.—What page?

Mr. Badeley.—It is reported in Moore, p. 781. It was a case where the party was deprived by the High Commission Court for not conforming to the canons. There was then a presentation to the living by the Crown. It was alleged that the living had become vacant. A bill in Chancery was founded upon it, and the case was heard before Lord Ellesmere, then Chancellor, assisted by three very eminent judges, one of them being no less than Lord Coke himself; another, Lord Chief Justice Popham; and the other, Lord Chief Baron Fleming, and they resolved: "Que les Canons del Eglise fait per le Convocacon et le Roi sans Parliament lieront en touts matters Ecclesiastical cy bien come Act de Parliament, car ils diont que per le common Ley chescun Evesque in son Diocess, Archevesque en son province, et Convocation meason en le nacon poit faire Canons de lier dein lour limits. Et pur Ceo le Convocation del Clergy fuit un foits un member del Parliament de cest realm, mes aps. pur l'ease severt et encore aport sa peculiar function ove luy eins le Convocation meason. Et un Clergy home ne poit ore estre del Parliament meason des Commons, ne temporal home del Convocation, come Coke cite, que fuit resolve per ambideux measons sur Conference ensemble anno 21, H 8, per que quant le Convocation fait Canons de choses appertaining al eux, et le roy eux confirm, ils lieront tout de realm."

Then there was a case in Ventris's Reports, where

there was a decision by my Lord Vaughan, which will be found in 2 Ventris, p. 41. That is the case of Grove *v.* Elliot, in which Mr. Justice Archer said, "We must give "faith and credit to their proceedings, and presume that "they are according to their law, 4 Coke, 29. The King "with the Convocation may make orders and constitutions "for the government of the Church."

Mr. Justice Coleridge.—Does it appear in what sense the word "Church" is used there,—whether it means clergy or not?

Mr. Badeley.—Not from what the Judge says himself, but from the rest of the case; and from what Chief Justice Vaughan says, it does appear what it means. He says: "As to the canons of 3 James, certainly they are of "force, though never confirmed by Act of Parliament: "indeed, no canons of England stand confirmed by Act "of Parliament; yet they are the laws which bind and "govern in ecclesiastical affairs. The Convocation, with "the licence and consent of the King under the Great "Seal, may make canons for the regulation of the Church, "and that as well concerning laics as ecclesiastics, and "so is Lyndwood. Indeed, they cannot alter or infringe "the common law, statute law, or King's prerogative; "but they may make alterations (viz. in ecclesiastical "matters) or else they could make no new canons. All "that is required of them in making of new canons is, that "they confine themselves to Church matters." So that he, a Judge of great reputation, takes the same view as was adopted by the court in the case of Bird *v.* Smith, to which reference has already been made; and therefore it appears distinctly from this that there are decisions conflicting with the doctrine laid down by my Lord Hardwicke.

It might also be asked, whether the doctrine so laid down by my Lord Coke and his co-adjutors, and by my Lord Vaughan subsequently, is not more in accordance with the Statute of 24 Henry VIIIth, cap. 12, than the doctrine of Lord Hardwicke.

Lord Denman.—What is your quotation?

Mr. Badeley.—I was saying that it may be questioned

whether the position of Lord Coke and his co-adjutors in the case of Bird and Smith, and of Lord Vaughan in the latter case I have mentioned to your Lordships, is not more in accordance with the Statute of 24 Henry VIIIth, cap. 12, than the position of my Lord Hardwicke in Middleton and Croft, because there is a remarkable preamble to that statute, which says: "That where by divers old authentic "histories and chronicles it is manifestly declared and ex- "pressed that this realm of England is an empire;"—then it goes on to say, "there is a body politic, compact of all "sorts and degrees of people, divided in terms and by "names of spiritualty and temporalty, being bounden and "owen to bear to the king as supreme head next to God, "a natural and humble obedience, he being also institute "and furnished, by the goodness and sufferance of Al- "mighty God, with plenary, whole, and entire power, pre- "eminence, authority, prerogative, and jurisdiction, to "render and yield justice and final determination to all "manner of folk, residents, or subjects within this realm, "in all causes, matters, debates, and contentions, hap- "pening to occur, insurge, or begin, within the limits "thereof, without restraint or provocation to any foreign "princes or potentates of the world; the body spiritual "whereof having power, when any cause of the law Divine "happened to come in question, or of spiritual learning, "then it was declared, interpreted, and showed by that "part of the said body politic, called the spiritualty, now "being usually called the English Church, which always "hath been reputed and also found of that sort, that both "for knowledge, integrity, and sufficiency of number, it "hath been always thought and is also at this hour, suffi- "cient and meet of itself, without the intermeddling of "any exterior person or persons, to declare and determine "all such doubts, and to administer all such offices and "duties as to their rooms spiritual doth appertain, for the "due administration whereof, and to keep them from "corruption and sinister affection, the king's most noble "progenitors and the antecessors of the nobles of this "realm, have sufficiently endowed the said Church, both "with honour and possessions; and the laws temporal,

" for the trial of property of lands and goods, and for the " conservation of the people of this realm in unity and " peace, without rapine or spoil, was and yet is adminis- " tered, adjudged, and executed, by sundry judges and " ministers of the other part of the said body politic, " called the temporalty; and both their authorities and " jurisdictions do conjoin together in the due administra- " tion of justice, the one to help the other."

So that it would rather seem as if the legislature there considered that the Convocation was, as a body, sufficient of itself to determine matters properly within its cognizance, namely, those which are distinctly ecclesiastical, as stated by Lord Vaughan. That however, my Lords, is matter of inference.

But a further question might be raised upon that very case of Middleton and Croft, whether this position of Lord Hardwicke does not in itself involve a fallacy, because if it is true, as my Lord Hardwicke lays it down, that the Convocation by its canons, without the aid of parliament, will be binding at once, *ipso jure*, upon the clergy, then it follows as a matter of course, that the clergy, by refusing to obey any of those canons, become chargeable with an ecclesiastical offence, and are liable to be proceeded against in the Bishops' Court, and will be punishable by suspension or deprivation, as the case may be, or by other censures. Then, if the clergy would be compellable to obey the canons, they are binding upon them, and, if so, they would indirectly be binding on the laity; because, if the proper subject-matter of a canon is a matter relating to the discipline of the Church, to the administration of sacred rites, and those matters which are peculiarly sacred things, and the province of the clergy to administer, then of course the laity could not participate in those benefits, except through the intervention of the clergy, and the clergy, in the administration of the sacraments for instance, would be bound to take those rules which the canons lay down. The clergy would be bound to give effect to those canons, whatever they might be, and the laity could only participate in the ordinances of the Church, so regulated, through the medium of the clergy,

and therefore they would be in subjection to the canons so made. This might materially interfere with many of their civil privileges. It might affect them in their right to fellowships, and to different foundations and scholarships. It might apply to them with reference to the office of schoolmaster, or in a variety of matters for which Church membership is a necessary qualification, and therefore, from the mere fact of their binding the clergy, as Lord Hardwicke says they do, it seems to me to follow as a matter of course, that they would bind the laity indirectly.

Mr. Justice Coleridge.—From what you read from Bird and Smith, it was supposed there that the bishop in his diocese, the archbishop in the province, and the convocation for the nation had power?

Mr. Badeley.—It says so certainly.

Mr. Justice Coleridge.—Then if this be an ecclesiastical matter, that of marriage,—it must depend upon the bishop's own decree in his own diocese, what the law should be?

Mr. Badeley.—It might raise a difficult question, perhaps, how that would be, and how far that position would be borne out.

Mr. Justice Coleridge.—And then we might have one law of marriage in one diocese, and another in another?

Mr. Badeley.—It might extend to this, that a clergyman obeying that particular rule of the bishop of his diocese, might not be liable to ecclesiastical censure.

Mr. Justice Coleridge.—The very argument you use, that it would affect the laity indirectly, seems to show that it goes to that; your argument is just in saying that the laity would be indirectly affected if the clergy were bound.

Mr. Badeley.—How far that would be I do not pretend to say.

Mr. Justice Coleridge.—It rather goes to the root of that argument in Bird *v.* Smith, does it not?

Mr. Badeley.—Yes; but I do not think it necessarily follows, because that part of the doctrine in Bird and

Smith might fail, that therefore the rest should fail, with respect to Convocation, as being a body composed of the whole clergy of the kingdom, and being qualified by common law, and in some degree by statute. If the statutes respecting the privileges of the clergy are to be regarded, there would be authority of the greatest and highest nature for saying, that a Convocation would have the power of binding the clergy generally throughout the realm, whatever might become of the minor question, as to the individual power of a bishop in his diocese. I do not think, therefore, that the question of a bishop's power in his own diocese would necessarily affect the question as it respects a Convocation. It is mentioned by Lord Coke as a rule which formerly was in force, and which may be considered as in force still.

The Judges do not go into it further. I merely cite it as an authority to show that there is ground for saying, upon the authority of able Judges, that the power of Convocation to make canons which would bind the laity as well as the clergy, without the assent of Parliament, is affirmed there most distinctly; and I think the point which arises as to the power of the Bishop would not necessarily affect that question.

I think, if necessary, it might also be proper to inquire whether the ground upon which Lord Hardwicke puts the point which I am now considering is not open to objection. My Lord Hardwicke seems to ground it upon the principle of representation—that the laity are not represented in Convocation. Now upon that subject considerable doubt might be entertained whether that was the proper mode of putting that point. The laity never were represented as a body in any convocation, or in the councils of the Church; from the time of the Apostles downwards, the clergy were the constituent members of the convocations, and of the councils; and in this country, most undoubtedly, the laity never formed a part of the Convocation. It is true, that in different countries one rule has prevailed at one time, and another rule has prevailed at another. In some cases of councils, some of the laity have been present, and have taken part in

making canons connected with discipline, but nothing more; and those seem to have been allowed to be present, not so much by right, as by favour of the clergy and the bishops who presided at those meetings. The laity never formed a constituent portion of councils generally; and the principle of representation was not that which was the idea or theory of the councils of the earlier, or even of the later Church; and certainly does not appear to have been the principle adopted here. And, my Lords, undoubtedly the principle of representation, as far as the laity are concerned, would hardly seem to be a fair test, or a proper source of argument, being inconsistent with historical facts; and therefore this of itself would throw great doubt upon my Lord Hardwicke's doctrine, if it were necessary to consider that case of Middleton and Croft.

But, my Lords, I do not think it necessary for me to impugn that doctrine at length, or, indeed, to consider it further, because my belief is, that it will not be found to affect this case at all, and that this case really stands entirely independent of that particular position of Lord Hardwicke's.

The point decided by Lord Hardwicke in Middleton and Croft, with reference to the facts before him, was, that a canon made in affirmance of the ancient ecclesiastical law of the realm was in itself binding upon the laity, and that it was not interfered with by any statute which was not absolutely inconsistent with it. That position, my Lords, was entirely in accordance with other authorities that we have had, and has never been attempted to be impugned. Upon that decision, the real decision in the case of Middleton and Croft, I am perfectly prepared to stand; and I think it will be found, and I shall be able to satisfy your Lordships, that the judgment in Middleton and Croft, upon that which was the only point really decided, is distinctly and decidedly in my favour. Because, if I can show that the ancient ecclesiastical law, not only elsewhere, but here, has always declared these marriages to be incestuous, then I apprehend, a canon of 1603, or any other which goes to the same point, is in itself binding upon the laity, even in

Lord Hardwicke's own opinion. His words are, "There "are many of the canons of 1603 which are only decla- "ratory of the ancient usage in the Church, which by "reason of such ancient allowance will bind the laity."

Mr. Justice Coleridge.—Not *proprio vigore?*

Mr. Badeley.—But as being in affirmance of the old law. If, therefore, I satisfy your Lordships that this is an ancient law of the Church generally, then the case of Middleton and Croft, so far from being any authority against me, is completely and immediately an authority in my favour.

I come, therefore, to consider, what is the ancient law of the Church upon this matter, and more particularly the law of the Church of England; and I think it would be hard to find any single point connected with the morals or discipline of the Church more certainly and distinctly ascertained from the earliest period than this, that these marriages have been always discountenanced and prohibited by the Church, and have been always deemed incestuous. The earliest canon of the Church that we have upon this subject is one of the Apostolical canons, which is certainly very early indeed. Although my learned friends seemed to treat the Apostolical canons as of no value, there can be, and now is, no doubt in the minds of learned men that the Apostolical canons are of very great authority,—that they were compiled together and put into the form in which they are, as a body of canons, about the end of the third, or quite at the commencement of the fourth century. The probability is, that in the latter part of the third century, before the year 300, they existed as a body of canons, and in the same form as a body as that in which they at present remain. They are referred to by some of the earliest writers; they are referred to by St. Basil, by St. Athanasius, by Eusebius, by Julius, Bishop of Rome, and also by the council of Constantinople held in 394. The point was doubted at one time, but the doubt was cleared up by one of the most able and learned prelates of our Church, Bishop Beveridge, who has most clearly shown, in a very elaborate and learned publication,

what is the true date to be assigned to these canons, —that although they may not have been collected together, in the form in which they stand now, as one body of canons, until the period I have mentioned, they were made at different times, in the earliest period of the Church, and that they were then first collected, having been scattered and dispersed before, but that many of them date even from the times of the Apostles.

That view, my Lords, of Bishop Beveridge has also been shown to be the true one by Cotelerius, who, in the *Patres Apostolici*, has published not only Bishop Beveridge's, but Bishop Pearson's views; and I think those are admitted by learned men to have set that question at rest. Therefore, when my friends spoke of the Apostolical canons as being of no authority, I think the learned world is entirely against them.

Another objection was made to those canons, and, I believe, to some of the other ancient canons, by my friends on the other side, which was this: that many of them are disregarded by the clergy, such, for instance, as those relating to second marriages, or to the manners or dress of the clergy. But I apprehend that all that has really nothing to do with the matter. My learned friends ought to know, and must know, that canons are of various natures and various descriptions; that some relate to faith and morals, and others merely to discipline and order; that the former will of course be binding generally and at all times,—though, perhaps, the penalties by which they are sanctioned may vary, the subject-matter of them would be binding generally at all times. Those relating to discipline and order will vary from time to time with the state of society, and with the circumstances of each country at different periods. The mere fact of certain of those canons, or any other body of canons, being slighted or disregarded, or being obsolete, cannot alter or affect the question with respect to others which relate to matters of faith or morals. Therefore, inasmuch as marriage has always been deemed in every period of the Church to be a matter intimately connected with morals (as it undoubtedly is), and to be a religious rite (for the Church

has always viewed it as such, and the Church of England does so at this day),—it being, therefore, a religious matter, that which is to regulate the degrees within which marriage is to be allowed, must be considered to be a matter of the highest moral nature, and not merely a judicial or merely a ceremonial question.

If, my Lords, the argument of my friends in that respect were to prevail, and the Apostolical, or any other body of canons, were to be disregarded or superseded generally because some of them have become obsolete, that same argument might apply to statutes. Take the case of Magna Charta, of the statutes of Westminster, or any other, there are many matters in those statutes which are undoubtedly of the very essence of the Constitution, and which are always referred to and acted upon by our courts. Many portions of them also have become obsolete, and have fallen altogether into disuse. No objection can be made to certain of those enactments, because others have failed; and it would be rather a strange thing to oppose the constitutional doctrines of Magna Charta, because others which relate to matters of an ephemeral description have ceased or become obsolete.

Now, my Lords, I think the objections my friends took were as to matters connected with the dress of the clergy, or their frequenting taverns, or their having female servants or dependants in their houses, or as to their second marriages; and all those will be found to be merely matters of discipline and order. These have varied at different times with the state of society, and therefore the mere fact of their being disregarded now cannot apply to that which is to regulate the degrees of marriage, or the parties who are allowed to marry.

So far, therefore, for my friends' objections upon that point. I believe my friend Mr. Forster dwelt more particularly upon this subject, but I think that he mistook the argument, or the application of it to this point. These ancient canons are referred to, not so much as being actually in force here now, except as they may have been incorporated into other canons, and handed

down in perpetual succession by the Church to the present time; but they are evidence the most cogent to show what was the ancient discipline of the Church, and how the matters treated of by those canons were regarded in the most ancient period. What is this canon then? It is, "Qui duas sorores duxit vel consobrinam, "non potest esse clericus." It may be said that that refers only to the clergy; I think it refers to the laity also; because it is most distinct evidence to show, that the persons thus forbidden to be admitted into Holy Orders were persons who were considered to be impure persons, persons who had contracted a stain, persons who were standing in such a position that their adoption into the order of the clergy would have given scandal and offence; and if that is so, it forms a strong ground for saying, that the laity generally were prohibited from these marriages, and that they were considered incestuous at that time. I am citing now from Bishop Beveridge's Synodicon, Vol. i. page 13, a most learned work, in which a great number of canons are collected together; and he gives the Gloss or Commentary of the earliest commentators upon these canons. He gives the Gloss of Balsamon in the first instance, who says this: "Eum ergo qui "ducit in uxorem vel duas sorores, vel amitam, et con- "sobrinam, non permittet Canon fieri clericum; licet "omnino matrimonium irritum fiat. Tu autem scias, "quod non solum qui ejusmodi quicquam fecerit, sed et "qui aliud matrimonium propter consanguinitatem vel "affinitatem prohibitum contraxit, non fiet clericus, sed ei "pœna potius imponetur."

Then he gives the Gloss of Zonaras, which is in these terms: "Illicitæ enim nuptiæ ipsum non solum arcent a "clero, sed etiam pœnis subjiciunt, quin et per legem "civilem punitur illegitimas iniens nuptias, quas et lex "etiam distrahit."

Then comes the Gloss of Aristenus, which is in these words: "Talis cum pœnâ hâc quod non potest fieri cle- "ricus, gravioribus etiam suppliciis subjicitur, distractis "insuper et illegitimis nuptiis."

So that here is an authority distinctly showing how those marriages were regarded at that time.

LORD DENMAN.—What were the two epithets?

MR. BADELEY.—"Distractis insuper et illegitimis nup-"tiis," the marriage was annulled.

LORD DENMAN.—Pulled asunder.

MR. BADELEY.—Here, then, is a distinct authority for saying, upon the interpretation of that canon, the earliest upon the subject, that those marriages were deemed incestuous in the laity, and so incestuous, and so bad, as not only to preclude them from Holy Orders, but also to subject them to punishment.

That canon was followed by a number of others in the earlier Church. The council of Eliberis, which is generally referred to, was held in the year 313; and the 61st canon of the council of Eliberis is this: "Si quis post "obitum uxoris suæ sororem ejus duxerit et ipsa fuerit "fidelis, quinquennium a communione placuit abstineri, "nisi forte dari pacem velocius necessitas coegerit in-"firmitatis."

And then comes the council of Neo-Cæsarea, A.D. 314, and the canon there was to this effect. It applies more immediately to the case of two sisters, but your Lordships will find that it refers also to the marriages of men: "Mulier si duobus fratribus nupserit abjiciatur usque ad "mortem, verumtamen in exitu, propter misericordiam, "si promiserit quod facta incolumis hujus conjunctionis "vincula dissolvat, fructum pœnitentiæ consequatur. Quod "si defecerit mulier aut vir in talibus nuptiis, difficilis erit "pœnitentia in vitâ permanenti."

MR. JUSTICE COLERIDGE.—"Abjiciatur usque ad mor-"tem," means excommunicated, I suppose?

MR. BADELEY.—Yes, my Lord. These canons are given at length in *Harduin's Collection of Councils.* The council of Eliberis is in the first volume of Harduin's Councils, page 256, and the council of Neo-Cæsarea is in the same volume of Harduin, page 282.

Then, my Lords, there was the council of Orleans, which was held in the year 511; by the 18th canon of

which it was provided: "Ne superstes frater torum de-
"functi fratris ascendat, neve se quisquam amissæ uxoris
"sorori audeat sociare. Quod si fecerint, ecclesiasticâ
"districtione feriantur." That council and the canons passed at it will be found in the 2nd volume of Harduin's Councils, page 1011.

Then, my Lords, there was the council of Epone, in 517, and there the 30th canon is to this effect: "Incestis
"conjunctionibus nihil prorsus veniæ reservamus, nisi
"cum adulterium separatione sanaverint. Incestos vero
"nec ullo conjugii nomine prævelandos, præter illos quos
"vel nominare funestum est, hos esse censemus. Si quis
"relictam fratris, quæ pæne priùs soror exstiterat, carnali
"conjunctione violaverit; si quis frater germanam uxoris
"accipiat; si quis novercam duxerit; si quis consobrinæ
"sobrinæve se societ; quod ut a præsenti tempore pro-
"hibimus, ita ea quæ sunt anteriùs instituta non sol-
"vimus. Si quis relictæ avunculi misceatur, aut patrui,
"vel privignæ concubitu polluatur. Sane quibus con-
"junctio illicita interdicitur, habebunt ineundi melioris
"conjugii libertatem."

The canons of the council of Epone are in 2 *Harduin's Councils*, page 1050.

I believe, my Lords, that I might find others of a very early date if it were necessary to cite them at length, but I think that these are sufficient. Adopted as they have been, and were very early, into the general body of the canon law, I feel that this may be sufficient to answer the purpose.

But I would call your Lordships' attention to a letter of the celebrated Saint Basil upon this very subject, which is to be found in the Benedictine Edition of *St. Basil's Works*. It is the celebrated letter of St. Basil to Diodorus upon the marriage with the wife's sister.

Mr. Justice Coleridge.—In which volume?

Mr. Badeley.—It is in the third volume of the Benedictine edition of *St. Basil's Works*, p. 329. The date of St. Basil, as your Lordships probably know, was about the year 350; therefore it is a very early authority. I

have a translation of it here, a portion of which I will read. He refers to the question which had been asked him, and speaks of it as "something that he shuddered "at;" that is, that such a marriage should have been supposed lawful; and then he goes on and says: "First of "all we have to allege that which is of the greatest "weight in such matters—the custom established among "us; which is equivalent to a law, inasmuch as such "ordinances have been handed down to us by holy men: "and the custom is, if a person, at any time, mastered by "an impure passion, shall have fallen into a lawless union "with two sisters, neither to account this a marriage, nor "to receive such at all into the body of the Church, "before that they are separated from one another; so "that even if we had nothing else to say, custom had "sufficed, as a safeguard of what is right. But since he "who has written the letter has endeavoured, by means "of a forgery, to introduce into society so great an evil, "it seems requisite that we should not forego the support we may obtain from a discussion of the subject; "although it be the case, that in matters very evident "and palpable, the preconceived notion of each is preferable to any reasoning." St. Basil there (and that is a remarkable circumstance) refers to this as the ancient custom of the Church. He shows distinctly that it had always been the law and custom of the Church to regard such marriages as incestuous and void.

He then goes on to refer to the 18th chapter of Leviticus, and to ground the custom and the law upon the book of Leviticus. He says: 'We are asked whether it "is written that a man may marry one sister after having "married another? We answer, what is both safe and "true, that it is not written. But to infer that which "arises from natural consequence, but is not expressed, "is the part of the legislator, not of one who is citing "the law; for in this way, whoever would dare such a "deed might take the sister even during the wife's lifetime, for the same sophism will fit this case also. For "it is written, he will say, 'Thou shalt not take to vex "her;' so then he hath not prohibited taking her where

" there is no vexing. Whoso then pleadeth for passion will " decide that the temper of the sisters hath nothing " 'vexing' in it. The reason, then, being done away for " which he prohibits his living with both at once, what is " to hinder his taking both sisters? But these things are " not written, we will grant, neither is the other defined; " but if a meaning is to be attached to it by way of " inference, it would equally afford a licence to both " cases. But in order to get out of the difficulty, it will " be necessary to recur to the circumstances which pre- " ceded the publication of the law; for the legislator " does not appear to embrace every species of offences, " but especially to interdict those of the Egyptians, from " among whom Israel had gone forth, and those of the " Canaanites, among whom they had come."

He then, in another part of the letter, which is so long that I will not trouble your Lordships with the whole of it, says: " How, therefore, when he interdicted the greater, " did he pass over the less in silence? Because it ap- " peared that to many of the carnal minds who were " disposed to cohabit with two sisters yet living, the " example of the patriarch might be prejudicial. But " what ought we to do? To declare what things are " written, or further to work out those things that are " passed over in silence? To take a case in point; it is " not written in these laws that father and son ought not " to cohabit with one woman; and yet by the prophet it " is denounced as the greatest of crimes; 'for the son,' it is " said, 'and the father have gone in to one woman.' And " how many other kinds of unclean passions are there " which the teaching of devils hath invented, but the " Divine Scripture hath omitted to mention, not choosing " to defile its own delicacy by the mere naming of things " shameful, but condemning impurities in general terms? " As the Apostle Paul says, 'But fornication, and all " uncleanness, let it not be once named among you, as " becometh saints.' By the term uncleanness, including " crimes of men and women that are unmentionable, so " that it is not the case that silence affords licence to " the lovers of pleasure. But I maintain that this point

" is not passed over in silence, but that the legislator " hath prohibited it in the very strongest manner; for the " expression, 'None of you shall approach unto any that " is near of kin to him, to uncover their nakedness,' em- " braceth also this species of relationship. For what can " be more akin to a man than his own wife, or rather his " own flesh? 'for they are no longer two, but one flesh.' " So that by means of the wife the sister also passes into " the kindred of the husband, so that as he shall not take " the mother of his wife, nor the daughter of his wife, " because he shall not take his own mother, or his own " daughter; so in like manner he shall not take the sister " of his wife, because he cannot take his own sister. And " on the other hand, neither shall it be lawful for a " woman to marry the kindred of her husband, for on " either side the rights of kindred are common to both. " But I for my part testify to every one deliberating " concerning marriage, that 'the fashion of this world " passeth away, and that the time is short, so that they " who have wives should be as they that have none;' but " if any one should perversely read to me that expression, " 'Increase and multiply,' I smile at his not discovering " the sense of these laws. Secondly, marriages are a " remedy against fornication, not an occasion for impure " desire. 'If they cannot contain, let them marry,' it is " said; but not to let them in marrying act against all " law."

That letter of St. Basil I consider to be particularly valuable, so very early as it is in its date, and referring, as it does distinctly, to the very same grounds of these prohibitions which we have in our own law, viz., the Levitical prohibitions,—referring to them as the source of authority, and showing most clearly, as it does, that the custom of the Church from the earliest period had been always such, and that it had been confirmed in the strongest manner. That law of St. Basil was acted on in the Church, and has always been received in the Greek Church, as well as in the Latin; for in this very volume of Bishop Beveridge's Synodicon which I have before me, at p. 223 there are the canons of the Sixth Council

in Trullo (which was a hall in the palace of the emperor, in which the councils were held), and in p. 222 there is the fifty-fourth canon, and the gloss of Balsamon and Zonaras upon it. The canon is: "Cum divina Scriptura "nos aperte doceat, Non ingredieris ad omnem consan- "guineum carnis tuæ ad revelandam ejus turpitudinem, "divinus Basilius nonnullas prohibitas nuptias in suis "canonibus enumeravit, multis silentio præteritis, et his "utrisque nobis utilitatem attulit. Turpium enim nomi- "num multitudine evitatâ, ne verbis orationem pollueret, "generalibus nominibus impuritates complexus est, per "quas legibus vetitas nuptias nobis in summâ ostendit. "Quoniam autem propter ejusmodi silentium, et quòd "non discerni posset illicitarum nuptiarum prohibitio, "seipsam natura confudit, nobis visum est ea paulò aper- "tiùs exponere, ab hoc deinceps tempore decernendo ut "qui cum fratris sui filiâ matrimonii societatem coierit "(vel pater et filius qui cum matre et filiâ vel cum "duabus puellis sororibus, pater et filius, vel cum duobus "fratribus mater et filia, vel fratres duo cum duabus "sororibus) in Septennii Canonem incidant, iis apertè "separatis a nefario contubernio." That was a canon which was adopted, and which became in force in the Greek Church, and is to this day; and it is evidence to show how, in regular succession, this law was handed down, and how early it was received and made a constituent part of the law of the Greek Church, as well as the Roman.

And so, my Lords, the law came down gradually, and was received into the general body of the canon law. I have referred your Lordships to authorities which were prior to the date of the canon law as a body of laws. These laws were incorporated into the general body of the canon law, and became part and parcel of it. I could easily refer your Lordships to various portions of the canon law, in which they are distinctly set forth: passages would be almost too numerous to cite. These very councils are referred to; the councils of Eliberis, of Epone, and the council of Orleans, and several others, and the canons of the Apostles are constantly

cited, and so we have in the *secunda pars Decreti*, Causa 35, Quæst. 2 and 3, the law thus stated: "Et "hoc quoque statutum est, ut relictam patris uxoris suæ, "relictam fratris uxoris suæ, relictam filii uxoris suæ, "nemo sibi in matrimonium sumat: relictam consan- "guineorum uxoris suæ, usque in tertiam progeniem, "nemo in uxorem sumat: in quartam autem et in quin- "tam, si inventi fuerint, non separentur." And in the same page of the *Corpus Juris Canonici*, vol. i. p. 1842, there is this gloss: "Sicut mulier debet consanguineos "proprii viri vitare, ita et vir consanguineas uxoris suæ; "cum enim una caro sint, utraque parentela est illis "communis."

So, again, at page 1849 of the first volume of the *Corpus Juris Canonici*, there is this passage: "Porro "de affinitate, quam dicitis parentelam esse, quæ ad virum "ex parte uxoris, seu quæ ex parte viri ad uxorem per- "tinet, manifestissima ratio est: quia, si secundum divinam "sententiam ego et uxor mea sumus una caro, profecto "mihi et illi meâ suâque parentelâ propinquitas una "efficitur. Quocirca ego et soror uxoris meæ in uno et "primo gradu erimus; filius vero ejus in secundo gradu "erit a me; neptis vero tertio; idque utrinque in cæteris "agendum est successionibus. Uxorem vero propinqui "mei cujuscumque gradûs sit, ita me oportet attendere "quemadmodum ipsius quoque gradûs aliqua fœmina "propriæ propinquitatis sit. Quod nimirum uxori de "propinquitate viri sui in cunctis cognationis gradibus "convenit observari. Qui vero aliorsum sentiunt, anti- "christi sunt; a quibus tanto fortius vos oportet cavere "quanto apertius deprehenditis illos divinis legibus re- "pugnare."

Again, in the *Clementine Constitutions*, lib. iv. tit. 1, it is laid down, "Eos qui (divino timore postposito in "suarum periculum animarum) scienter in gradibus con- "sanguinitatis et affinitatis constitutione canonicâ inter- "dictis, aut cum Monialibus contrahere matrimonialiter "non verentur * * * * refrænare metu pœnæ ab hujus- "modi eorum temeritatis audaciâ cupientes, ipsos excom- "municationis sententiæ ipso facto decernimus subjacere."

There is this gloss upon it: "Nota secundo, quod non "solum contrahentes in casibus prohibitis in lege Cano- "nicâ debent sustinere pœnas hic contentas, immo etiam "contrahentes in casibus prohibitis in lege Divinâ. Nota "quod contrahens cum consanguineâ vel affine ipso facto "incurrit sententiam excommunicationis, nec ipsa excom- "municatio est relaxanda nisi satisfactione habitâ." So that here, in the earliest collections of the canon law, we find this adopted, and we meet with various passages repeating it, over and over again. It is unnecessary to fatigue your Lordships by referring to authorities, but these earlier canons are constantly referred to and adopted as part and parcel of the canon law.

I have, therefore, shown that, before the body of the canon law existed, this was the law generally of the Church in the east and west; that it ultimately became embodied in the canon law, and that the canon law afterwards branched out and extended the boundaries beyond the Levitical prohibitions, which were undoubtedly the basis of its own prohibitions.

So much, my Lords, for the general view of the law. I now propose to show your Lordships, that as, before the body of the canon law was formed, there were repeated canons, which showed what was the discipline of the Church generally with respect to these marriages, so it is plain by old authorities in this country, that before the body of the canon law became part of the ecclesiastical law of this realm, as a body of laws, as undoubtedly it afterwards did, there were canons framed at various periods of the English Church, expressly prohibiting these marriages.

In a work which has been published lately under the authority of the Record Commissioners (the *Ancient Laws and Institutes of England*), there are two or three ancient laws of this kind. In the first volume of the *Ancient Laws and Institutes of England*, at page 257, it is laid down among the laws of King Edmund, "well "is it also to be looked to that it be known that they, "through kinship, be not too nearly allied; lest that be "afterwards divided, which before was strongly joined."

Then the note is this: "The canons of the time had fixed "this in the seventh degree: 'Christiani ex propinquitate "sui sanguinis usque ad septimum gradum connubia non "ducant, neque sine benedictione sacerdotis, qui ante in- "nupti erant nubere audeant.'"

In the same volume, at p. 319, among the canons of King Ethelred there is this: "And let it never be that a "Christian may marry within the relationship of six "persons in his own kin, that is within the fourth degree; "nor with the relict of him who was so near in worldly "relationship; nor with the wife's relation whom he before "had had."

So again, in the same volume, at page 365, there is a statute or a canon among the laws of Canute, in which it is laid down, "And we instruct and beseech, and in God's "name command, that no Christian man ever marry in "his own family within the relationship of six persons, "nor with the relict of his kinsman who was so near of "kin; nor with the relative of the wife whom he had "previously had." That is in pretty nearly the same terms as that which I read immediately before. Those are some of the earliest that we have, but there are many others of very early date, which are given at length in *Sir Henry Spelman's Concilia.* The first he mentions are the answers of St. Gregory the Pope to St. Augustine, in the year of our Lord, 597. "Quædam ter- "rena lex in Romanâ Republicâ permittit, ut sive frater "et soror, seu duorum fratrum germanorum vel duarum "sororum filius et filia misceantur, sed experimento didi- "cimus ex tali conjugio sobolem non posse succrescere; "et sacra lex prohibet cognationis turpitudinem revelare. "Unde necesse est ut jam tertia vel quarta generatio fide- "lium licenter sibi jungi debeat. Nam secunda, quam "prædiximus, a se omni modo debet abstinere. Cum "novercâ autem miscere grave est facinus, quia in lege "scriptum est *Turpitudinem fratris tui non revelabis;* "neque enim patris turpitudinem filius revelare potest: "sed quia scriptum est, 'Erunt duo in carne unâ,' qui tur- "pitudinem novercæ, quia una caro cum patre fuit, reve- "lare præsumserit, profecto patris turpitudinem revelavit.

" Cum cognatâ quoque miscere prohibitum est." So that there, with reference to these prohibitions, he refers expressly to the prohibitions of Leviticus, and to the same principle that St. Basil takes in the letter I have already read.

Then, my Lords, in the same volume of *Sir Henry Spelman's Concilia*, at page 272, of volume the first, among the exceptiones Egberti Archiepiscopi Eboracensis, we read, " Si quis de propriâ cognatione, vel quam cognatus " habuit, duxerit uxorem, anathema sit; ad quod respon- " dentes omnes dixerunt, Amen."

So again, at page 298, in the council of Calchutha, a council held in the north of England, in 787, we have, " Interdicuntur omnibus injusta connubia et incestuosa, " tam cum ancillis Dei vel aliis illicitis personis quam cum " propinquis et consanguineis vel alienigenis uxoribus; et " omnino anathematis mucrone perfoditur, qui talia agit, " nisi correctus resipiscat a tam nefandâ præsumptione; " et suo episcopo obtemperans, se ipsum ad æquitatis nor- " mam corrigat et revocet."

Then, my Lords, in the same volume, at page 417, among the constitutions of Odo, Archbishop of Canterbury, we have, " Septimo capitulo prohibemus et interdicimus om- " nibus Christianis injusta connubia et incestuosa, cum " monialibus vel cognatis vel cum aliis inlicitis personis."

So again, my Lords, in the same volume, page 463, " Si " mulier aliqua duos sibi accipiat fratres in conjugium, " alterum scil. post alterum, judicio sint obnoxii, et " insistant pœnitentiæ (usque dum vixerint) solertissime, " prout instruxerit ipsorum confessarius, et morientibus " demum debita Christianorum obsequia sacerdos illis " conferat; si et hoc promiserint, se diutius acturos fuisse " pœnitentiam, si diutius eis vivere contigisset."

And again, in the same volume, page 501, among the Leges Presbyterorum Northumbrensium, the date of which (though it is not given) appears to be very early indeed, for they are given in Saxon as well as in Latin, there is this canon: " Prohibemus etiam (ut a Deo est " prohibitum) ut nemo habeat nisi uxorem unicam et hanc " utique debitè conjugatam, et in conspectu (publico), " datam antea; et ut nemo matrimonium contrahat in " cognatione suâ scil. infra gradum seu geniculum quar-

" tum, nec cum consponsali suâ ad fontem sacrum." So that these marriages with near kindred were absolutely prohibited.

Then again, in the council of Œnham, which was in the year 1009, and which is given in page 516 of this very same volume of Sir Henry Spelman's Concilia, (they are all given also in *Wilkins's Concilia*, but I prefer referring to Sir Henry Spelman's, as a work more generally accessible, and as being the work referred to by Lord Hardwicke himself in the case of Middleton and Croft,) " Nec permittatur unquam ut Christi fide imbutus infra " spatium sexti hominis suæ consanguinitatis uxorem " ducat, id est infra quartum gradum seu geniculum; " neque cujuspiam viduam qui pari fuerit proximitate in " mundanâ cognatione, nec uxoris quam habuerat prius " neptem seu propinquam."

Then among the laws of Canute, he gives, at page 543, a canon, which I believe is the same as that, to which I have already referred your Lordships, from the ancient institutes of England.

Then, my Lords, in the second volume of *Sir Henry Spelman's Concilia*, there are later councils which adopt the same rule. At page 8, the council of London, in the time of Archbishop Lanfranc, and of William the Conqueror, we have, " Ex decretis Gregorii Majoris, " necnon Minoris: ut nullus de propriâ cognatione, vel " uxoris defunctæ, seu quam cognatus habuit, uxorem " accipiat, quoadusque parentela ex alterutrâ parte ad " septimum gradum perveniat." The councils of the Church generally had extended the law then beyond the Levitical degrees.

Then again, in the council of London, held in the time of Henry I., which is given in page 22 of the second volume of the same work, we have, " Ut cognati usque " ad septimam generationem ad conjugium non copulentur, " vel copulati simul permaneant, et si quis hujus incestûs " conscius fuerit et non ostenderit, ejusdem criminis par- " ticipem se esse cognoscat."

Then there is the same again in a council of London, at page 29, which I need not read to your Lordships, it being precisely the same in its terms.

So again, in a council at Westminster, in the time of Henry I., at page 34 of the second volume, it is ordained, "Inter consanguineos seu affinitate propinquos usque ad "septimam generationem matrimonia contrahi prohibe-"mus. Si qui vero aliter conjuncti fuerint separentur."

In the same volume, in the time of King John, there is the council of London.

MR. JUSTICE COLERIDGE. — Does it appear that at these successive councils—two in the same reign—they re-enacted what had passed before?

MR. BADELEY.—Sometimes they did, my Lord; but very few of those I have read are of the same reign.

MR. JUSTICE COLERIDGE. — William the Conqueror and Henry I., and both are in the councils of London.

MR. BADELEY. — They were separate councils, my Lord.

MR. JUSTICE COLERIDGE. — Were they provincial councils?

MR. BADELEY.—Some of them were. The council of London, to which I am now referring, was a general council of the English Church, for Sir Henry Spelman calls it Concilium Generale Londonense.

MR. JUSTICE COLERIDGE.—By the Archbishop of Canterbury?

MR. BADELEY.—In the time of Hubert, Archbishop of Canterbury.

MR. JUSTICE COLERIDGE.—I thought it was held by the Archbishop of Canterbury. Does it say what archbishops or bishops were present?

MR. BADELEY.—No, I do not think it does, my Lord, here. In some of the councils which Sir Henry Spelman gives, he does state who have been present, but that is not so here. He mentions it as a general council of London.

MR. JUSTICE COLERIDGE.—From the frequent repetition of it within so short a period as the time of William the Conqueror and Henry I., one would rather infer that it was not obeyed.

MR. BADELEY.—It might be necessary, from some circumstances which we are not aware of at this distance

of time, to repeat it frequently. There may have been a disposition then, as there is perhaps now with many people, to infringe that rule. What may have led to the frequent repetition of them I do not know. At one of the councils of London, which was held before, the list of bishops who attended, and abbots, and different heads of the Church, is given. In this, one of the councils of London, which is stated by Sir Henry Spelman to be a general council, the canon is, "Vir non contrahat cum "aliquâ consanguineâ olim uxoris suæ, similiter nec uxor "cum aliquo consanguineo quondam viri sui."

They seem to have taken in hand the subject of marriage generally, and to have re-enacted all the prohibitions and laws relating to marriage, whether for greater caution or for greater publicity one does not know. It is not, however, merely these prohibitions of the wife's sister which are particularly mentioned, but this is included with others. The canons seem to have gone to confirm the general laws relating to marriage, and to regulate the subject of marriage universally.

Mr. Justice Coleridge.—Have you observed whether as they go on they increase the number of the prohibited degrees?

Mr. Badeley.—No, my Lord; they have got at this time to the rule of the Church, which was extended to the seventh degree.

Mr. Justice Coleridge.—In the first of those in the time of William the Conqueror?

Mr. Badeley.—I think at that time they had, my Lord; not in the earlier ones, because in that one of St. Gregory, which was the earliest I read from Sir Henry Spelman, the rule had not then extended so far.

Among the Constitutions of Salisbury (which are in the same volume of Spelman), in the time of Stephen Langton, Archbishop of Canterbury, (this was not a general council, but merely a provincial one,) this occurs: "Ad hoc prohibemus ne vir contrahat cum aliquâ consan-"guineâ olim uxoris suæ, similiter nec mulier cum "aliquo consanguineo quondam viri sui usque ad quartum "gradum."

So again in the Constitutions of Richard, Bishop of Durham, in page 178 of this volume, it is: "Ad hoc "prohibemus ne vir contrahat cum aliquâ consanguineâ "olim uxoris suæ, similiter nec mulier cum aliquo con- "sanguineo quondam viri sui usque ad quartum gradum." And though this may have been merely the constitution of a particular bishop (the Bishop of Durham), he refers immediately afterwards for the degrees of consanguinity to the rule as laid down by a general council.

Then, among the constitutions of the time of Henry III., given by Sir Henry Spelman, at p. 235 of the same volume, a constitution runs thus: "Ad hæc prohi- "bemus ne matrimonium contrahat quis cum consan- "guineâ olim uxoris suæ, similiter nec uxor cum aliquo "consanguineo quondam mariti sui." Then it goes on with reference to other degrees, and with reference to the subject of marriage generally.

In the council of York, held in the reign of Edward II., in the time of William Greenfield, Archbishop of York, in the year 1317, in p. 473 of Sir Henry Spelman's second volume, we have: "Item excommunicantur "omnes illi qui scienter in gradibus consanguinitatis vel "affinitatis a canone interdictis vel cum Monialibus de "facto matrimonium contrahunt."

So that in all cases, in regular succession downwards, we have the early canons of the English Church, provincial councils, general councils of the English Church, and regulations of particular bishops, uniformly adopting the same, and excluding from marriage a wife's sister.

These, as I have stated to your Lordships, were many of them prior to the general prevalence and reception of the canon law in this country. Subsequently to these periods, we have the canon law generally adopted with respect to this point in the courts of this country, and therefore those particular councils became unnecessary, because, like the earlier canons of the Church generally, to which I have referred your Lordships, these canons of the English Church merged in the general body and stream of the canon law, and the canon law became, for

this purpose, the received and adopted law of the courts of England. I have traced both the one and the other, the rule of the primitive Church generally, and the rule of the early English Church, into the canon law, and I will now proceed to show your Lordships how completely the canon law and the rules of the canon law were adopted in this country, in respect to this matter.

One of the earliest authorities, perhaps, is that of Bracton; and Bracton, in book ii. cap. 29, speaks distinctly of the prohibited degrees as being well understood, and he refers particularly to the canon law as administered by the ecclesiastical courts.

MR. JUSTICE COLERIDGE. — Can you give us that again—the reference to Bracton?

MR. BADELEY.—Bracton, book ii. cap. 29.

The same appears, my Lords, in Fleta, book i. cap. 14, and there is an express reference to the prohibited degrees as settled by the canon law.

Your Lordships will find the same thing also in the year books. There are several authorities in the year books to this effect. There is the year book 18 Edward IVth, 29, where express reference is made to the prohibited degrees as declared by the canon law and the law of the Church; and the question whether a marriage was valid or invalid, and the issue legitimate or illegitimate, was determined by the court as these were prohibited or permitted by the canon law.

MR. JUSTICE COLERIDGE.—Is that a case decided in 18 Edward IVth, or is it only a dictum?

MR. BADELEY.—It was the very essence of the case itself; so again, my Lords, in 18 Henry VIth, 34 B., your Lordships will find a reference to the prohibited degrees, the degrees recognized by the canon law.

Lyndwood, also one of the earliest authorities on the canon law in this country, in page 175, refers to the "Impedimenta Canonica," as being those which prohibited marriage in this country, and he refers repeatedly to the chapters and portions of the canon law where these "Impedimenta Canonica" are ascertained. He died (as your Lordships know) in 1446. His citations

are all from the ancient canon law, and there is very little indeed, and it is remarkable how little there is, in Lyndwood, upon the subject of marriage. For all his references upon the subject are to the canon law, and he seems to adopt that as a matter of course, as the law recognised in this realm. In page 180, under the word "consanguineis," he says, "Hæc dictio generalis est tam "quoad clericos quam ad laicos." Showing that the same rule applied to the laity as to the clergy in these matters.

In the volume immediately appended to Lyndwood, are the glosses of John de Athon upon the constitutions of Otho and Othobon: and at page 154, your Lordships will find he gives precisely the same definitions of consanguinity and affinity as are given in the canon law, and in the general authorities of the canon law, adopting clearly the same rule.

There is also, my Lords, a very early and a very curious work upon the subject, which is even earlier than Lyndwood himself, a copy of which I have here.

It is a work which was referred to a good deal in the argument in a late case, which your Lordships may remember, the case of the Queen *v.* Millis. It was referred to also by Lord Chief Justice Tindal in his judgment in that case. It is undoubtedly a book of very great authority, as showing what was the received doctrine of the canon law, at that time prevalent in England. I refer to the work, which is called by the quaint title of *Pupilla Oculi*. It was the work of a very celebrated person in his day, John de Burgh, who was professor of theology, and chancellor of the university of Cambridge. The work is a remarkable one of itself, as being one in more universal use, and of more universal celebrity in England, at the early period when it was written, than any other work, perhaps, that we know of. It is noticed by various authorities as a work of very considerable repute in its time; and there are many copies of it now in the British Museum. In *Cave's Historia Literaria*, it is mentioned as a work much admired and esteemed, and in general use. It was published originally I think in 1380 or 1388, towards the end of the 14th century. Now in the 8th

part, at chapters 9 and 10, the author states all the rules relating to consanguinity and affinity. He adopts entirely the rule of the canon law upon the subject, and shows by that, that it was the received law of England at that period. His very definitions of consanguinity and affinity are the same as are given in the canon law, and they correspond with Lyndwood and with others. He says: "Matrimonium "contrahendum impedit affinitas dirimitque contractum. "Est autem affinitas secundum canones propinquitas quæ-"dam ex carnali commixtione mediante consanguinitate "proveniens; omni carens parentelâ. * * * Unde omnes "consanguinei uxoris meæ scilicet usque ad quartum "gradum inclusive sunt mihi affines. Et in eisdem gra-"dibus quibus sunt consanguinei uxoris, ut puta consan-"guineus uxoris meæ est mihi affinis in primo gradu, et ita "de aliis. Similiter omnes mei consanguinei modo præ-"dicto sunt affines uxoris meæ in eisdem gradibus quibus "sunt consanguinei mei. * * * Et sicut vir abstinere "debet a matrimonio consanguinearum suarum propri-"arum, ita et a matrimonio consanguinearum uxoris suæ "propter affinitatem, et similiter uxor a consanguineis "mariti sui abstinere debet sicut a propriis. Quamvis "nullam fœminam de consanguinitate uxoris meæ liceat "mihi eâ mortuâ in conjugem accipere propter affini-"tatem impedientem, tamen &c." and then he proceeds to show what family connexions are not included in the prohibition, and gives the rules in the same manner, and for the most part in the same language, which we find in the Corpus Juris Canonici, and the principal treatises of the canon law. I cite this, for the purpose of showing by this treatise—one universally in use, as we know it was among the clergy of this country in the early part of the 15th century, and down I believe to the period of the Reformation—that the same rule was adopted here that was established generally by the canon law, and that that rule of the canon law was affirmed and acted on throughout England.

There is a very early work, which I have here, to the same effect, which refers to John de Burgh, and adopts the same definitions. It is a work supposed to be by

Alexander de Ales or Hales, who was one of the most celebrated schoolmen of his time. It could not have been by him however, because it refers to John de Burgh, and John de Burgh was later than Alexander de Hales. It is mentioned by Cave in his *Historia Literaria*, and it is attributed by him to Alexander de Hales, though there had been some doubt about it, and I see clearly by its reference to John de Burgh, that it must have been of a later date. It is called *Summa seu Destructorium Vitiorum*, and I find in it this passage: "Et notandum "quod omnis consanguinitas uxoris meæ scilicet usque ad "quartum gradum inclusive sunt mihi affines, et in eisdem "gradibus quibus sunt consanguinei uxoris meæ, ut puta "consanguineus uxoris meæ in primo gradu est mihi "affinis in primo gradu, et ita de aliis; similiter omnes "consanguinei mei modo prædicto sunt affines uxoris "meæ et in eisdem gradibus quibus sunt consanguinei "mei. Et quod dixi de uxore meâ intellige de quâcun-"que aliâ muliere a me carnaliter cognitâ; quia per "coitum fornicarium contrahitur affinitas, ut dictum est; "sed tamen consanguinei mei nullo modo sunt affines "consanguineis uxoris meæ, nec inter eos matrimonium "prohibetur. Unde pater et filius contrahere possunt "cum matre et filiâ, et duo cognati cum duabus cognatis, "et avunculus et nepos cum duabus sororibus. Et sicut "debet vir abstinere a matrimonio consanguinearum su-"arum propriarum, ita a matrimonio consanguinearum "uxoris suæ propter affinitatem, et similiter uxor a con-"sanguineis mariti sui abstinere debet, sicut a propriis," very nearly the same language as John de Burgh himself uses;—John de Burgh himself also adopting the language of the canon law;—so that thus you see this law adopted universally in England, and the canon law, and the rules of the canon law recognized as being in force here by the authority of the courts of common law, reported in the year books, by Bracton, and by Fleta, to whom I have referred your Lordships, and also by the practice of the ecclesiastical courts, as it appears not only from decided cases, but from these works of John de Burgh and Lyndwood, which have been allowed and acted upon as

authorities for showing what the ecclesiastical law of those periods really was.

It is a remarkable thing, my Lords, that this law with respect to the wife's sister was adopted very early into the civil law, to which I ought to have called your Lordships' attention before; but in a work to which I referred the other day, that of Pothier, the *Traité du Contrat de Mariage*, he speaks of the prohibitions of the Levitical law, and then he mentions the civil law, and says that affinity in the direct line was always an impediment to marriage; that marriage was not forbidden by the Roman laws between persons who were only related to each other by affinity in a collateral line, till the law of the Emperor Constans, who forbade, as incestuous, a marriage with the widow of the brother, or with the sister of the deceased wife. This law was renewed by Valentinian and Theodosius: "Fratris uxorem ducendi vel duabus sororibus "conjungendi penitus licentiam summovemus, nec disso- "luto quocumque modo conjugio." *Lib.* 5, *Cod. de incest. nupt.* Pothier then proceeds to say, that Honorius violated that law by marrying two sisters, but that afterwards it was confirmed and enforced by the code of Justinian.

Your Lordships will find this matter referred to, and a historical view of the subject given, in this work of Pothier, the *Traité du Contrat de Mariage*, Part III., chapter 3, which occurs in the third volume of the works of Pothier, pages 200 and 201.

And, my Lords, so strong was the feeling with respect to these marriages generally, that this law was adopted into the laws of most of the early Christian nations of Europe, which arose after the destruction of the Roman empire.

In the work of Lindenbrogius, the *Codex Legum Antiquarum*, page 69, I find this passage amongst the laws of the Visigoths: "Nullus præsumat de genere "patris vel matris, avi quoque vel aviæ, seu pa- "rentum, uxoris, fratris etiam desponsatam aut viduam, "vel propinquorum suorum relictam sibi in matrimonio "copulare." And amongst the laws of the Alemanni there is this: "Nuptias prohibemus incestas. Itaque

"uxorem habere non liceat socrum, nurum, privignam, "novercam, filiam fratris, filiam sororis, fratris uxorem, "uxoris sororem." I cite these to show how universally this law was adopted; it was adopted not merely by the Church, but by the early Christian nations of Europe; it prevailed in the Church of the East, and of the West; it was the rule of Christendom.

In the same volume of Lindenbrogius, in page 593, the *Leges Longobardorum*, we have, "De his qui de illicito "matrimonio nati sunt vel nascuntur, id est de matrinâ, "aut filiastrâ, vel cognatâ, quæ fuit uxor fratris, aut soror "uxoris, quia Canones sic habent de duabus sororibus "sicut de duobus fratribus. Et qui de tali matrimonio "natus fuerit, heres legitimus patri suo non sit, sed ipsam "rem habeant parentes propinqui, et si parentes propinqui "non fuerint, succedat curtis Regia."

And at page 595 immediately afterwards, "De incestis "conjunctionibus hoc præcipitur, ut nullus deinceps pro- "pinquam, nec quam propinquus habuerit uxorem, ducat "in conjugio; et uxoris parentela ita sit viro sicut propria "parentela."

There are several others in the same volume, to which I need hardly refer your Lordships. I have mentioned them by way of illustration, and to prove the general consent of the Christian world upon this important subject.

I have now traced the law, my Lords, in this way; first, from the early period of the Church into the general body of the canon law; I have also traced it in this country from a very early period indeed—the Saxon period, and the earliest period to which our records extend—and we have seen it carried down uniformly to the time when the canon law was adopted generally in this country. We find the canon law, and the prohibitions of marriage established by that law, adopted and acted upon by our courts at the periods to which I have referred. And so the matter went on, undisturbed, as it would seem (at all events we have nothing to show the contrary), till the period of the Reformation.

Then, my Lords, came the Reformation, and with it the

Statute of Henry VIIIth, and I think it will be found that that Statute of Henry VIIIth, although it cut off certain prohibitions which had been imposed merely by ecclesiastical authority, yet left all those which were within the Levitical degrees, and so were deemed to be of Divine authority, and which had been the earliest prohibitions of the Church, untouched. It made no alteration at all with respect to those prohibitions, and determined nothing in contravention of the decisions of the ecclesiastical courts, or the rules of the canon law, as to what were to be regarded within the prohibitions of the Levitical degrees. It is remarkable that the statute of 32 Henry VIIIth, in adopting the Levitical degrees as the extent to which the prohibitions should be carried, merely adopted a distinction which had long prevailed in the canon law itself; for in the canon law a distinction had always been made, at least, had been made for a very long period, between those prohibitions which were "lege Divinâ," and those which were only attributable to ecclesiastical authority. Within the former—within those which were prohibited by the revealed word of God—by the book of Leviticus—the papal power of dispensation had always been exerted, if exerted at all, with very great caution, and with the utmost reluctance, for it was laid down in the canon law, that the Pope *could not*, except for the gravest reasons, and in extreme cases, dispense with those prohibitions which were grounded on the Book of Leviticus; and, therefore, the Statute of Henry VIIIth, in adopting that distinction, and confining those prohibitions to the Levitical degrees, merely took up the distinction of the canon law itself, and cut off only those which had been added to the Levitical prohibitions by ecclesiastical authority alone.

Your Lordships will find, in a volume of the *Corpus Juris Canonici*, which I have before me, a proof of this distinction; for in the Decretals, in the second folio volume of the *Corpus Juris Canonici*, at p. 635, there is express reference made to the degrees which rested *jure Divino*, and those which had been added merely by

ecclesiastical authority. The question had arisen with respect to the power of decreeing a restitution of conjugal rights, and the text runs thus: "Rescripto petebas "Apostolico edoceri, utrum cum aliquis consanguinitatis "gradus objicitur, *in quo sedes Apostolica dispensare* "*non potest*, nec etiam consuevit, et probationes promptæ "sunt et paratæ, indulgenda restitutio sit an neganda:" and the gloss upon the words "non potest" is this: "Id "est non vult, vel non expedit, *sic* 32, 9, 5, c. *si Paulus* "*in gl. suscitare*, quoniam Papa in omnibus dispensare "potest quæ non sunt contra articulos fidei vel generalem "statum ecclesiæ * * * * * Idem credo de gradibus Di- "vina lege prohibitis; ut hic dicit unde proprie ponitur "hoc verbum *non potest*, et ideo hæc expositio, non vult, "vel non expedit, non habet locum hic." He is there merely considering the force of the word "'potest," but in that gloss he treats the Levitical degrees as those which the Pope would not consider himself, except in extreme cases, entitled to dispense with, and then, under the terms "gradibus consanguinitatis divinâ lege prohi- "bitis," there is this gloss: "In Levitico cap. 18, Primò "quidem propter hominum raritatem tantum duæ per- "sonæ excludebantur a conjugio, ut nec filius matrem, "nec filia patrem duceret. Sub lege excepit fere duo- "decim, matrem, novercam, sororem, neptem, amitam, "materteram, uxorem patrui, uxorem fratris; sed hoc "recepit determinationem 8 *quæst.* 1 *c. olim* privignam, "filiam privigni vel privignæ, sororem uxoris, paucas tum "exclusit, ut multiplicarentur homines. Sub gratiâ verò, "scilicet tempore Christi, plurimæ personæ excluduntur, "ut locum haberet continentia, et est illa prohibitio con- "jugii: nam a fornicatione quilibet et quælibet exclu- "duntur, et ita cum ecclesia in istis gradibus divinâ lege "prohibitis non consueverit dispensare, eis oppositis non "est restitutio facienda, et hoc videtur sonare litera ista." And then he gives the verses which were cited the other day, enumerating the different persons who are precluded by the Levitical law; I refer to this as proving by the canon law itself that the prohibitions of the Levitical law, which were adopted and made the basis of the canon

law, were already considered indispensable, and were placed on an entirely different footing by the canon law itself from those which were afterwards added, when they extended the prohibitions to the seventh degree. The statute, therefore, of Henry VIII. really made very little alteration in that respect; it only cut off some which the Church or ecclesiastical authority had imposed.

This distinction, my Lords, as recognised in the canon law, is noticed in a very curious work, which has been lately edited—I can hardly call it published—by Lord Medwyn, one of the Judges of Scotland, a copy of which I have here through the kindness of my Lord Medwyn. It is the *Liber Officialis Sancti Andreæ*, and it consists of various processes, in matters matrimonial principally, in the ecclesiastical courts of Scotland, at very early periods of their history. It has been edited with great care by my Lord Medwyn, and is a most valuable and interesting work. In his preface, he says: "Whatever may have been the motives that in- "duced the Church thus to extend the prohibitions of "the Levitical code, one necessary result was the great "demand for dispensations from the head of the Church, "and those wielding his authority. The Pope's dis- "pensing power and its extent were the subject of con- "stant discussion, in which the canonists certainly never "lost sight of the distinction between the prohibitions of "nature or the Divine law, and those established by "the councils of the Church. In Scotland, the ques- "tion was perhaps rather avoided than settled. Among "the innumerable and daily dispensations for marriage, "we have no indication of any papal dispensation being "granted to parties within the Levitical degrees." That is in p. 22 of Lord Medwyn's preface. I shall be happy to hand the book up to your Lordships for your use, as it is not, I believe, to be met with easily. He says in his note: "The Fourth Lateran Council, 1215, in "making the necessary regulations against receiving the "admissions of parties with regard to the uncanonical "degrees, and requiring the evidence of witnesses, uses "these words: 'Sed nec tales sufficiant nisi jurati de-

" ' ponant se vidisse personas saltem in uno prædictorum
" ' graduum constitutas pro consanguineis se habere.
" ' *Tolerabilius est enim aliquos contra statuta hominum*
" ' *copulatos dimittere quam conjunctos legitime contra sta-*
" ' *tuta Domini separare.* 152.' In like manner, Pope
" Gregory speaks of degrees of consanguinity *divinâ lege*
" *prohibitis*, in opposition to these *constitutione interdictis*
" *humanâ.* Decret. L. ii. p. 12. And Pope John, in 1333,
" ordained, ' De illis vero ex conversis prædictis gentilium
" ' qui ante conversionem ipsorum cum personis eis at-
" ' tinentibus in quibuscunque consanguinitatis vel affini-
" ' tatis gradibus *a lege divinâ non prohibitis* matrimonia
" ' contraxerunt vel ante conversionem suam contraxerint
" ' in futurum, taliter respondemus, quod in favorem præ-
" ' sertim Christianæ religionis et fidei, fideles hujusmodi
" ' sic matrimonialiter copulati vel in posterum copu-
" ' landi juxta constitutionem felicis recordationis Inno-
" ' centii Papæ III. predecessoris nostri super hoc editam
" ' quæ incipit *Gaudemus*, in matrimoniis ipsis dictis im-
" ' pedimentis non obstantibus, libere possint et licite re-
" ' manere conjuncti.' " Thus Lord Medwyn shows the practice of Scotland, and states what he had observed himself in the canon law, as to the distinction drawn there between the one kind of prohibitions and the other. The statute therefore of Henry VIII., my Lords, established no new rule. It merely cut off a certain number of prohibitions which had been added to the Levitical degrees, and had become, if I may use the expression, incrusted upon them, and it left the ecclesiastical courts precisely as they were. It made no alteration at all in the jurisdiction of these courts, and no alteration in the rules which these courts had adopted and acted on from the earliest period, with reference to the persons who were to be considered as included within the Levitical degrees, and it is clear that they always, up to that period recognised the case of a marriage with a wife's sister as included within them. The extract, which I read just now from the canon law, recognised these very distinctions, and put the case of the wife's sister in express terms, and it is evident, from every book upon the

subject, that the wife's sister was always regarded as included within these prohibitions. The statute of Henry VIII., therefore, if it rested there, would be quite sufficient to refer to, as showing what was the practice up to that period, and what was the known state of the canon law when the statute of Henry VIII. was passed. It was quite easy, then, to construe the term "Levitical "degrees," and to understand what it meant. Whatever we find to be the contemporaneous exposition of that term must be the proper exposition and the proper key to the meaning of the legislature in the passing of the Statute of 32 Henry VIIIth, and using the term "Levitical degrees," for "contemporanea expositio est "fortissima in lege."

Now, that contemporaneous exposition we have, my Lords, in the statute to which I referred your Lordships the other day—the Statute of 28 Henry VIIIth, cap. 7, where all these degrees, and the persons enumerated in Leviticus, are detailed in the statute itself, and the marriage of the wife's sister is included within them, and all those are declared to be "plainly prohibited and detested "by God's laws:" so that here was a statute which was in force at the time when the Statute of 32 Henry VIIIth was passed, the Statute of 28 Henry VIIIth, cap. 7, and 28 Henry VIIIth, cap. 16, which refers to cap. 7, as declaring and defining, by the authority of the legislature, what was meant by the term "God's law." We have thus statutes undoubtedly in force, the voice of the legislature clearly proclaiming what was the understanding of that day, and what the legislature meant to leave, and did leave, when it merely restricted the ecclesiastical courts to marriages within the Levitical degrees.

In addition to that, my Lords, (for it will be necessary now to bring the case down from the period of the Reformation to the present,) we have, very shortly after the Reformation, and after the Statute of Henry VIIIth was passed, that work to which I referred the other day, the *Reformatio Legum*, which, as Lord Stowell stated, was valuable, as showing the understood and received practice on these matters at that time. There is an

"*enumeratio personarum in Levitico prohibitarum*," and the words are these: "In Levitico dispositæ personæ citantur "his nominibus: mater, noverca, soror, filia filii, filia filiæ, "amita, matertera, uxor patrui, nurus, uxor fratris, filia "uxoris, filia filii uxoris, filia filiæ uxoris;" and, lastly, "soror uxoris," considering that degree to be clearly and directly prohibited by Leviticus. That shows, my Lords, what was the opinion of the canonists and ecclesiastical lawyers at that day, viz. that the wife's sister was included within the Levitical degrees, and that the Statute of Henry VIIIth was not supposed to have made any difference in that respect.

Then, my Lords, we have, in the reign of Queen Elizabeth, the table of Archbishop Parker, which is adopted and incorporated in the ninety-ninth canon of the year 1603. I am now taking that table, not as in itself of force, but merely as evidence, and almost contemporaneous evidence, to show what was the understanding at that time, and what was the interpretation put upon the Statute of Henry VIIIth; what was believed to be left by that statute; and the effect of leaving untouched the Levitical degrees. My friends admit on the other side, and there is no doubt of the fact, that in that table the wife's sister is included.

We have the same thing shown by the letter of Bishop Jewell, to which I took the liberty of referring your Lordships before, and which is given in the Appendix to *Strype's Life of Parker*, where he argues very forcibly that the marriage with a wife's sister is prohibited by the Book of Leviticus.

There is also the authority of Lord Coke in the 2*nd Institute*, 683, which I have already cited; by which it clearly appears what his view was of the effect of the Statute of 32 Henry VIIIth; for he gives the Table of Degrees within which parties are prohibited to marry, and expressly mentions among them the case of the wife's sister; so that we have his opinion also at a very early period after the Statute of Henry VIIIth was passed.

That brings us, my Lords, chronologically to the canon itself of 1603; and as evidence of what was the received

opinion of that day, independently of its binding force, and as evidence of what was and always had been from the time of Henry VIIIth downwards, the received interpretation of the ecclesiastical authorities, that canon of 1603 is of course valuable, carrying onwards, as it does, the current of authority.

In reference to that, my Lords, as to the effect in this respect of the canons of 1603, I would direct your Lordships again to a case which I cited in my former address, that of Butler *v.* Gastrill, which is in *Gilbert's Reports*, p. 156. I will not trouble your Lordships by reading again the passages to which I then referred for a different purpose, but I turn now to a passage which will be found in the judgment, at page 159, with reference to the canons. "The intention of our Statute" (that is, the Statute of 32 Henry VIIIth) "was to restore every thing according "to the prohibition expressed in the Law of God, and "plainly the Levitical computation of degrees was in the "manner they computed in the civil law, which was "from the propositus up to the common stock, and so "down again to the other relations. And by the canons "confirmed by Jac. 1, in 1603, the 99th canon expressly "saith thus, 'No person shall marry within the degrees "prohibited by the laws of God, and expressed in a table "set forth by authority in the year of our Lord 1563; "and all marriages so made and contracted shall be ad-"judged incestuous and unlawful, and consequently shall "be dissolved as void from the beginning; and the parties "so married shall by the course of law be separated. "And the aforesaid Table shall be in every church pub-"licly set up, and fixed at the charge of the parish.'" Then the judgment goes on thus,—"And it appears by "that Table that to marry a wife's mother's sister is in-"cestuous. Indeed, it has been duly objected to this "manner of argumentation, that the canons charged only "ecclesiastical persons, and do not bind the laity, because "they are made only by the clergy in convocation, and "so they only are bound by these rules; and laymen "are not bound, because such canons have not the consent "of the Commons and temporal Lords, and as such, canons

" cannot bind the laity as a law." Then comes the most important part of the judgment, to which I wish to call your Lordships' attention: " But to this I answer, that " these tables do show the sense of the Church of England, " and so are a proper exposition of the law of God, and, " by consequence, ought to have great weight with the " Judges when they expound the Levitical law; and they " are plainly the decision of the reformed Church, touching " the crime of incest; and they do retrench the exor- " bitant and unwarrantable constructions of the Church of " Rome, who made the law of God of none effect by " their traditions; and yet they expound the law of God " in its full latitude, and forbid marriage only to such per- " sons as are in equal degree to those mentioned in the " eighteenth chapter of Leviticus." This, my Lords, was the decision of the court, and the opinion of a great and eminent judge upon the canons of 1603, and the effect that was to be attributed to them: he takes them, as I submit they must be taken, as very strong evidence of what had been the law of the Church of England, and what was the understanding of that Church, as to the Levitical degrees, proving that these degrees had been left *in statu quo* by the Statute of 32 Henry VIIIth; and that the ecclesiastical courts, in adopting and enforcing the prohibitions as they had been used to do, were left entirely to themselves, their jurisdiction and their rules not being at all interfered with.

My Lords, in noticing just now the distinction in the canon law, between the Levitical degrees, and the prohibitions which were engrafted on them, and stating that it had been recognized in England, I forgot to mention a curious work which I have here, the *Summa Theologica* of Alexander de Hales, the eminent English schoolman of the 13th century, to whom I have already referred. He treats of the Levitical prohibitions as binding universally, and constituting, where they were broken, the crime of incest; and he regards the additional ones, which were merely sanctioned by ecclesiastical authority, as resting on entirely different grounds from the others, of which he says: " Quod " incestus in quantum hujusmodi malum est secundum se,

" quia transgreditur limites ratione vel lege Dei sine " auctoritate ecclesiæ determinatos;" and after showing that incest in the first ages of the world must necessarily have been different, he says: " Postea vero factâ multiplicatione " ampliore generis humani exclusæ sunt personæ aliæ et " factæ sunt illicitæ quæ prius erant licitæ, sicut habetur in " Levitico, et sunt plures numero sicut ibidem dicitur. . . . " procedente vero tempore secundum constitutionem eccle- " siæ facta est ulterior multiplicatio et plures factæ sunt " personæ illegitimæ ad contrahendum, et hoc modo dici- " tur incestus in quolibet statu esse malum secundum se."

He is considering how far incest was in itself a crime, as committed within one set of degrees or the other. I adduce this merely by way of illustration, and as evidence that the distinction of the canon law, which I have proved from the *Corpus Juris* itself, was recognized in England at a very early period; and therefore that the statute of Henry VIIIth adopted only that which the canon law and the English Church had already admitted and sanctioned. We have seen that when that statute was made, the previous statute of Henry VIIIth, viz. the 28 Henry VIIIth, cap. 7, which declared the degrees of Leviticus according to the form contained in the canon law, and included the case of the wife's sister, was undoubtedly in force. From the time of Henry VIIIth we have not only the contemporaneous exposition of that period, but we have the authorities I have cited to your Lordships down to the canon itself of 1603. It remains, therefore, to see how the courts have decided, for if the contemporaneous exposition is not sufficient in a case of this sort, and if there is any doubt as to its correctness, that doubt must be resolved by a reference to the decisions of the ecclesiastical courts themselves, those ecclesiastical courts having, from the most ancient period, exclusive jurisdiction in matrimonial causes, and having been left untouched, and their jurisdiction unimpaired, by the statutes of Henry VIIIth. These courts for all such purposes are superior courts, as was laid down in this very court, in the case of Ricketts *v.* Bodenham, by Mr. Justice Littledale, 4 *Adolphus and Ellis*, 433. He there says,

that "the ecclesiastical courts, in matters within their "jurisdiction, are superior courts, and not inferior to the "courts of Westminster Hall." And, my Lords, in Bunting *v.* Leapingwell, in 4*th Coke's Reports*, 29 [a], Lord Coke says this: "Forasmuch as the cognizance of the "right of marriage belongs to the Ecclesiastical Court, "and the same court has given sentence in this case, the "judges of our law ought (although it be against the "reason of our law) to give faith and credit to their "proceedings and sentences, and to think that their "proceedings are consonant to the law of holy Church; "for '*cuilibet in suâ arte perito est credendum*,' and so "have the judges of our law always done."

Lord Lyndhurst's judgment, in the case of the Queen *v.* Millis, was to the same effect, for he said: "It must "always be remembered that the spiritual courts were "the sole judges of the lawfulness of marriage, where "that question was directly in issue. If the question, "whether a marriage be lawful or not, was raised upon a "distinct issue in the courts of common law, the rule was "that it should be tried, not by a jury, but referred for de- "cision to the spiritual tribunal, and the certificate of the "bishop was conclusive." There is a case in *Sir Thomas Raymond's Reports*, p. 464, Watkinson *v.* Mergatron; I think it was referred to the other day, and I refer to it now merely to show the value to be attached to the decisions of the ecclesiastical courts in any case of doubt with respect to the law of marriage. "The plaintiff brought "the defendant into the Ecclesiastical Court for marrying "his wife's sister's daughter, and the defendant prayed a "prohibition, because out of the Levitical degrees; but "denied by the whole court, because it is a cause of "ecclesiastical cognizance, and divines better know how "to expound the law of marriage than the common "lawyers, and though sometimes prohibitions have been "granted in cases matrimonial, yet if it were now *res* "*integra* they would not be granted."

It seems, therefore, my Lords, from all these authorities (authorities of undoubted weight), that supposing the question was at all doubtful upon the Statute of 32 Henry

VIII., and upon the rule of the canon law, as left untouched by that statute, the decisions of the ecclesiastical courts from that period downwards are the best evidence, and the most conclusive evidence, of the law upon the subject.

Then, my Lords, I would ask, how have these courts decided? The answer is, uniformly in one way. The cases which were cited to your Lordships in the former argument were some of them cases distinctly upon this very point—as to the validity of a marriage with a wife's sister. One of them, that of Hill *v.* Good, was brought under the notice and subjected to the most careful investigation of the courts of common law, and those decisions have been acted upon from that period to the present. I shall not refer to the cases which have been already cited to your Lordships, further than just to give the names of those in which marriage with a wife's sister has been expressly declared to be incestuous and prohibited. You had first the case of Hill *v.* Good, reported in *Vaughan*, p. 302; then you had Harris *v.* Hicks, in 2 *Salkeld*, p. 548; Collet's case, in *Sir Thomas Jones'*, p. 213; Butler *v.* Gastrill, in *Gilbert's Equity Cases*, p. 159; Brownsword *v.* Edwards (the decision of Lord Hardwicke), in 2 *Vesey, Sen.*, p. 248; Falmouth *v.* Watson, in 1 *Phillimore*, p. 355; Chick *v.* Ramsdale, 1*st Curtis*, p. 44; a very recent case—and lastly, Sherwood *v.* Ray, decided by the Privy Council, and reported in 1 *Moore*, p. 353, in which Baron Parke and the other judges held, that the canon law is the law by which marriages are governed in this country, except so far as they are restricted by the Marriage Act, and that a marriage with a wife's sister is incestuous according to the Divine law; and towards the conclusion of his judgment, Baron Parke says, that "the marriage of a "wife's sister is illegal by the Divine and the human law." Thus, my Lords, the law appears in regular chronological order, from the earliest period of the Church and of this country to the present; you have had the law of the State and the law of the Church, both going uniformly in one direction,—down to the period of Henry VIII., the canon law adopted generally; at the time of Henry

VIII., and subsequently, only a portion of the canon law struck off, the rest being left untouched, and the decisions of the courts uniformly adopting the same rule, and uniformly holding these marriages to be incestuous.

I would ask your Lordships, therefore, whether any case can be stronger than this, to show what the law really is, and whether, when the statute of William IV. speaks of marriages "within the prohibited degrees of "consanguinity and affinity," and refers to the practice of the ecclesiastical courts, the legislature could have had in view any other prohibitions than those which had been so acted upon, and universally adopted by the ecclesiastical courts of this country, as the prohibitions contained in Leviticus, and enjoined by the statute of Henry VIII.? I would call your Lordships' attention to the words of the statute in reference to this point: "Whereas, marriages "between persons within the prohibited degrees are void-"able only by sentence of the Ecclesiastical Court, pro-"nounced during the lifetime of both the parties thereto, "and it is unreasonable that the state and condition of the "children of marriages between persons within the prohi-"bited degrees of affinity should remain unsettled during "so long a period; and it is fitting that all marriages which "may hereafter be celebrated between persons within the "prohibited degrees of consanguinity or affinity should be "*ipso facto* void, and not merely voidable;—Be it there-"fore enacted, by the King's most excellent Majesty, by "and with the advice and consent of the Lords spiritual "and temporal, and Commons in this present Parliament "assembled, and by the authority of the same, that all "marriages which shall have been celebrated before the "passing of this Act, between persons within the pro-"hibited degrees of affinity, shall not hereafter be annulled "for that cause by any sentence of the Ecclesiastical Court, "unless pronounced in a suit which shall be pending at "the time of the passing of this Act." Upon these words, my Lords, I do submit with confidence to your Lordships, that nothing can be clearer than that the statute of William IV. must be taken to refer to the prohibited degrees as adopted and acted upon by the ecclesiastical courts;

and that those, and those only, are within the meaning of the Act. Nothing can be clearer than that when a statute thus refers in its preamble, as well as in the body of it, to the ecclesiastical law in connexion with the subject of marriage, it must be taken to mean those degrees which are prohibited by that law, and to adopt them as the rule which is intended to be enforced.

My Lords, in *Bacon's Abridgment, title* "*Statute*," it is said, "It is in the general true that the preamble of a statute "is a key to open the mind of the makers as to the mischiefs "which are intended to be remedied by the statute."

Then, my Lords, if we see that the rule of the Church, from the earliest period, was the ecclesiastical law of this country down to the period of the Reformation, and that from the Reformation down to the canon of 1603 no alteration at all was made with respect to cases which were within the Levitical degrees, then it follows that the canon of 1603, in the regulations which it made, and in the persons whom it included within those degrees, merely adopted the ancient law of the land; and if so, I have established my point, that the case of Middleton *v.* Croft becomes a direct authority in my favour; for without troubling ourselves with Lord Hardwicke's questionable doctrine about the operation of canons generally, we have his judgment about the very point before him, precisely tallying with the present case, and declaring that such a canon as I have proved this of 1603 to be, is binding upon the laity as well as upon the clergy, and may be enforced as the law of the land; and as it is clear, from repeated cases, that this canon has been acted upon ever since it was made, without any doubt of its validity, its reception becomes evidence on Lord Hardwicke's principle, of its being in affirmance of the ancient law.

Then, my Lords, if that is so, I am at a loss to find what there is upon the other side. What authority has been cited? None at all of any value; none which can be used on any pretence against us. Parson's case and Mann's case, the only two referred to, I think, on the other side by Mr. Foster, so far from being for him, were proved to be directly against him; for the decision in

both these cases was, that a prohibition to the ecclesiastical courts should not be granted. So far, therefore, from the authorities being, as he stated them to be in part of his argument, in his favour, they are all universally with one consent against him. I cannot find a single authority for determining that these marriages are valid. I cannot find a single instance in which any doubt has been entertained by the courts of this country upon this subject since the decision of the court in Hill *v.* Good. The very question then was disputed, argued, and considered at very great length, and with very great care; and the result of that decision was, that marriage with a wife's sister was invalid. The ecclesiastical courts were left to enforce their rules upon that subject; and that case has been uniformly acted upon since, and must be law at the present day.

Then, my Lords, what have they produced on the other side? They have merely cited to your Lordships the statute of Queen Mary; but that statute of Queen Mary, as I submitted to your Lordships most confidently the other day, cannot interfere with this question, being merely a private act, relating to that particular marriage, the statute being most guarded in its terms, and never having been, so far as I can discover, used in any single instance to affirm any marriage similar to the one there referred to, much less a marriage with a deceased wife's sister. It has never been used for that purpose, or if it had been, it would, as I argued, have proved too much, inasmuch as it would sanction generally marriage with a brother's wife, which undoubtedly is prohibited in express terms by Leviticus. So that there is nothing in the cases or in the statute cited by my opponents, to impugn in the slightest degree these decisions, or to interfere with the law as I have ventured to lay it down before your Lordships.

Then, my Lords, what is the effect of the statute of William IV.? simply to affirm the judgment of the Ecclesiastical Courts. It makes no difference in that respect; and although objections have been made to the statute, as if it really inflicted a hardship, I apprehend it

is not open to that objection. That statute did not interfere with the principle of the law at all; and when it stated that such marriages should in future be "void and "not merely voidable," it merely made a distinction without a difference; — "voidable," in cases of marriage, always meant "void," for void they were according to the ecclesiastical law; and they were only said to be *voidable* because the courts of common law then had no jurisdiction upon the subject. The determination of the validity or invalidity of a marriage was left entirely to the ecclesiastical courts. It was ecclesiastical law and ecclesiastical courts which regulated those matters; and provided a marriage came before the courts having the stamp of the Church, and the authority of the Church in its favour, the courts of common law received it, and left it to the ecclesiastical courts entirely to set it aside if invalid. But when it was set aside,—when the ecclesiastical courts did interfere, then the marriage became void, and void *ab initio*. It was null and void to all intents and purposes; and in proof of that I would refer your Lordships again to a portion of my Lord Lyndhurst's judgment in the case of the Queen *v.* Millis, in illustration of that particular point, for he says (mentioning some authorities which had been furnished to him): "It (the libel in the case which he was citing) prays "that the marriage may be pronounced to have been and "to be, '*fuisse et esse*,' null and void, &c.; the evidence "is set forth, and is followed by the sentence, which dis-"solves the marriage *de facto* with Alicia, and pro-"nounces it *fuisse et esse invalidum*." And his Lordship afterwards says: "It further appears from the terms of "the sentence, that the dissolved marriage was pro-"nounced to have been and to be (*fuisse et esse*) void, "agreeably to the rule of the ecclesiastical courts,—that "when a marriage voidable by reason of pre-contract is "annulled, it is annulled *ab initio*."

And, my Lords, in that work edited by my Lord Medwyn, which I have cited, it is shown, that in all those cases where, by the process of the courts, marriages have been impugned upon the score of consanguinity or

affinity, the marriage is declared *fuisse et esse nullum.* Therefore it was merely a distinction arising from the want of jurisdiction in the temporal courts which led to the expression, "voidable" and "void;" *voidable* meant *void,* and the marriage was only awaiting the decision of the ecclesiastical court to determine that it had been *void ab initio.* The statute, therefore, of William IV., when it said they shall be "void and not merely voidable," did this; it merely transferred to the temporal courts, or, at least, gave to them jointly with the ecclesiastical courts, that power of determination upon the validity of certain marriages which had been confined to the ecclesiastical courts before. It enabled the courts of common law to determine at once that a marriage was void when it appeared to be within the prohibited degrees. It authorized them to take immediate cognizance of a matter of which before they had no judicial knowledge, and rendered it unnecessary for them to wait for the decision of the ecclesiastical courts to judge that a marriage was invalid. The statute made no alteration with regard to marriages themselves in that respect, because they were always void by the ecclesiastical law when within the prohibited degrees. It only enabled the courts of common law in a more summary manner and at once to determine for themselves, when the question came before them, without the assistance of the ecclesiastical courts.

Then, my Lords, objection was made to that statute, as if it were inconsistent with itself, in allowing certain marriages within the prohibited degrees of affinity, which had been solemnized before the passing of that act, to stand, and by refusing to have them impugned. Why, my Lords, in that the legislature did no more than the courts had previously done. It made no difference with respect to the marriages themselves. It simply did this, it adopted a new period of limitation, it was in the nature of a statute of limitation, and it was merely a statute of limitation for this purpose, making no difference in principle whatever, because we know from repeated cases upon the subject, that after the death of either of the

parties the temporal courts would not allow the ecclesiastical courts to institute, or carry through, any process for avoiding the marriage, because of bastardising the issue; and therefore, when either party had died, the period of limitation had arrived, after which the marriage itself could not be annulled. The legislature, by the statute of William IV., has merely adopted a new limitation. It has said that the marriages which were in existence prior to the passing of that act, and for the annulling of which no process had been instituted, should not be allowed to be annulled afterwards. It followed precisely the rule which the temporal courts had adopted, where either of the parties had died, and only therefore adopted a new period of limitation in certain cases. But, my Lords, the statute does not pretend to say that those marriages were either good or valid; and although I have looked carefully at the statute, I see nothing in it whatever to prevent the parties who have contracted those marriages from having a process instituted against them in the ecclesiastical courts for the incest, although not to set aside or annul the marriage. The statute leaves the matter precisely on the same footing as the court did, in the case of Harris *v.* Hicks, in 2 *Salkeld*, where, after the death of one of the parties, although the temporal courts said, " We will not allow the ecclesias-
" tical courts to carry on any process which shall annul
" the marriage, so as to bastardize the issue, we will not
" prevent them from punishing the surviving parties for
" the incest." And that case, my Lords, has been expressly confirmed by Lord Hardwicke, in his judgment in Brownsword *v.* Edwards, in 2 *Vesey*, page 243. He adopted the rule laid down by the temporal court, and said that although the marriage could not be annulled by a process for that purpose, the parties might still be punished for the incest. The Statute of William IV. leaves these marriages precisely in the same position. It does not pretend to affirm them, or to say that they are good marriages, or according to the law of God. It leaves the parties in their guilt, and, as I would submit,

open still to punishment in the ecclesiastical courts for incest, just as in Harris *v.* Hicks, they were left by the temporal courts in cases before the statute.

So that, my Lords, it really seems, looking at the whole case, that there is nothing in the Statute of William IV. which can properly be objected to; that it altered nothing in point of principle; that it made no infringement upon the general rule; but took the law as it was before, and enforced, rather than annulled, those decisions of the ecclesiastical courts.

So that, my Lords, I think, as far the ecclesiastical law is concerned, there has been but one uniform rule from the earliest period of the Church, and the earliest annals of this country, to the present, and that there is nothing either in the cases or in the late statute which in any respect interferes with those degrees of marriage, and those prohibitions which were left by the Statute of Henry VIII., and that from the earliest period to the present, one continued and connected series of law comes uniformly down to the present time; and it cannot be said now, that the Statute of William IV. has made any distinction or any difference in that respect, because the case of Sherwood *v.* Ray, to which I have referred your Lordships, and which was decided recently by the Privy Council, was subsequent to the passing of the Statute of William IV., so that the statute cannot be contended to have made any alteration, and you have therefore the law brought down from the earliest period to the present time, in one unbroken chain. I think it is impossible that any case can come before your Lordships more clearly and more conclusively fixed and settled than this. Two or three times we have seen attempts made in the temporal courts to annul the proceedings of the ecclesiastical courts, or to prevent their holding these marriages to be contrary to God's law, or the Levitical degrees; but the temporal courts, so far from infringing or interfering with the ecclesiastical courts, have affirmed their decisions, and have distinctly recognised these marriages as illegal.

I now come, my Lords, in the last place, to the point

which is peculiar to the case now before your Lordships, that of one of the parties being illegitimate; and I submit to your Lordships that that point can make no difference here, and that the laws of consanguinity and affinity apply to bastards, as they do to other persons. It is remarkable, that during so long a period, this point should never have been expressly decided in this country, but I think it may be said of this, as of many other points, that it has been always, as it were, held in solution in the atmosphere of the courts, though it has never been precipitated in any particular case. The nearest case we have is that of Haines *v.* Jeffcot, in 5 *Modern Reports*, page 169, which is also reported in *Comyns' Reports*, page 2. The case, as reported in Modern Reports, contains the argument more fully, and the case as reported in Comyns, contains the decision of the Judges more at length; and there the Lord Chief Justice (Holt, I think it was) appears to have said: "All the courts "seem to think it would be very mischievous, if a bastard "should not be accounted within the Statute of 32 "Henry VIII., for by that rule a man might marry his "own daughter; and where it is said, that a bastard is "the son of no one, this is in civil respects, and where "there is an inheritance."

There is a later case, in 3 *Salkeld*, page 66, the Queen *v.* Chafin, and there the court said, "a bastard is 'termi- "nus a quo,' he is the first of his family, for he hath no "relation of which the law takes any notice;" *but this must be understood as to civil purposes, for there is a relation as to moral purposes, therefore he cannot marry his own mother or bastard sister.*

In the King *v.* Hodnett, in 1 *Term Reports*, this court held, that bastards were within the meaning of the Marriage Act 26 George II., cap. 33, which requires the consent of the father, guardian, or mother, to the marriage of persons under age, who are not married by banns. Lord Mansfield said, "There is no reason to except ille- "gitimate children, for they are within the mischief in- "tended to be remedied by the Act." And Mr. Justice

Buller added, "The rule that a bastard is *nullius filius*," "applies only to the case of inheritance; it was so con-" "sidered by Lord Coke."

There is a case, my Lords, of Horner *v.* Horner, in *Haggard's Consistory Reports*, vol. i. page 352, in which Lord Stowell says: "According to the general policy of "law in matters merely moral, a person is said to be re-" "strained from marriage with illegitimate relations, as "much as with legitimate ones; because the rules of "prohibition of marriage arise out of natural relations, "and though these rules (as received by our law) are "perhaps carried further than might seem necessary on "mere moral and natural grounds, so far as they can be "exactly ascertained by mere reason, yet as they are "taken from the law of God, and have one common "origin therein, they are all considered as of the same "moral nature and obligation." It is however to be observed, that this matter does not appear to have yet received a final decision, because I see that in the case of Haines *v.* Jeffcot in 1 *Lord Raymond*, page 68, the cause was adjourned, and therefore no decision was given upon the question,—although undoubtedly the ecclesiastical court, the proper forum on questions of that nature, considered that in a case of that sort, the marriage would be bad between illegitimate relations.

In the note to *Thomas's Coke upon Littleton*, vol. i. page 146, he says, "The rule that a bastard is 'nullius "filius' applies only to the case of inheritances, and the "ties of nature held as to maintenance, and many other "purposes."

He cites also a variety of cases, to some of which I have referred your Lordships.

It is remarkable, my Lords, that the old authorities are to the same effect, for in *Bracton* (second book, page 21), speaking of the rules of succession and the right to property between heirs, it is said: "Si autem separatim, "et per se, et unus eorum moriatur, sine hæredibus vel "assignatis, res data revertetur ad donatorem pro defectu "hæredis vel assignati, quia *frater bastardus omnino ex-*" *traneus est ei quoad successionem, licet non quoad san-*

"*guinem.*" He adopts, therefore, the distinction which appears to have been acted upon in the cases to which I have referred, and which is the same that was stated by Mr. Justice Buller.

In *Ayliffe's Parergon*, the same thing appears in page 326. He says: "Though it is often said that there is no "room for affinity without a marriage contract, yet both "Accursius and Panormitan on the civil and canon law "do each of them hold, that affinity may be contracted "in bar to matrimony, without such a contract, though "not in respect of other matters.

In the *Pupilla Oculi*, to which I have already referred your Lordships, the same rule is adopted in the 8th part, chapter 10, *de affinitate;* it is said: "Et oritur affi- "nitas tam ex coitu fornicario quam matrimoniali seu "legitimo, et generaliter ex omni carnali commixtione "per quam vir et mulier dicuntur effici una caro;" and the author puts the connexion of consanguinity as an impediment to marriage merely upon the fact of the parties being derived from the same blood, just in the same way as the canon law itself puts it that the term "consanguinity" furnishes the rule, as being derived from "*con*" and "*sanguis*," and therefore that it is the natural connexion, and not merely civil relationship, which is to be regarded in matters of matrimony.

The canon law is clear upon the subject, and the passage in the second part of the Decretum in the *Declaratio Arboris Consanguinitatis*, in the second volume of the *Corpus Juris Canonici*, page 1853, "Dicitur autem con- "sanguinitas, quasi sanguinis unitas; a *con* et *sanguine;* "quia de communi sanguine descendunt: et quoad proba- "tionem conjugii non distinguo, an tales consanguinei sint "producti ex uxorio coitu, vel ex fornicario."

So again, my Lords, under the *arbor affinitatis*, at the end of the third volume, it is said, "Quod per fornica- "rium coitum et incestuosum secundum nos contrahatur "affinitas." And again, "Nec intererit quoad consan- "guinitatem vel affinitatem contrahendam ex justis nup- "tiis aliqui an ex damnato coitu invicem copulati fuerint." And in Lancellottus, in his *Institutiones Juris Canonici*,

it is stated, "Affinitas et consanguinitas contrahitur etiam "ex damnato coitu."

In a work which I have here, my Lords,—a work of very great authority on the canon law, and referred to by Lord Stowell more than once in his judgments, as one of great value,—the *Aurea Summa of Hostiensis* (page 1198), this question is considered; and taking the case as it stood upon the civil law, he shows also what the rule was with the canon law. He says, that the rule was more confined in the civil law, but then that must be understood with reference to what the civil law was providing for, namely, succession to estates; but, he says, "Re- "spondeo et dico præcedentia locum habere quoad ea "quæ proveniunt ex jure civili, sed cum matrimonium "sit de jure naturali, etiam inter tales dico matrimonium "prohibendum, cum pater utrumque naturaliter genuerit, "unde non est inspicienda, nisi sola conjunctio naturaliter; "nam et naturalis filius jus agnationis non habet, et "tamen inter ipsum et nepotem patris matrimonium con- "tractum dissolvitur, cum enim civilis cognatio matri- "monium solvat, multo fortius naturalis, quia in matrimo- "niis contrahendis non solum quid liceat secundum jus, "sed quid deceat secundum honestatem spectandum est." Indeed, my Lords, I do not believe that there can be any doubt at all upon that being the universal rule of the canon law, that the question was simply as to natural relationship; and wherever that existed, then that the prohibitions of marriage should immediately apply.

In a work, my Lords, which I cited the other day, *Broüwer, de Jure Connubiorum*, and a most excellent work it is, at page 482, the 13th chapter of the second book, I read, "Adfinitas vel vera vel ficta est; vera ex "conjunctione viri et fœminæ oritur; ficta ex sponsalibus, "de quâ postea: vera adfinitas vel legitima, vel naturalis "est; legitima conjungendæ adfinitatis causa fit ex nuptiis, "naturalis ex stupro, scortatione, vulgivagâ venere, con- "cubinatu, incestu. Nec consideratur, qualis sit con- "cubitus, etiamsi per vim præcisam coactus, vel cum "insanâ, ebriâ, somno profundo sepultâ, ut nesciat se "stuprari, commissus reperiatur. Utraque adfinitas jure

" canonico in prohibendis ejusdem efficaciæ est, et cog-
" nationis sive legitimæ sive naturalis naturam imitatur.
" *C.* 10, *causa* 35, *Q.* 2, 3, quamvis earum diversa vis in
" aliis juris partibus conspiciatur." Then he goes on to show in the rest of the chapter, how the rules of affinity apply merely from the fact of natural relationship, independently of any question of civil rights as connected with them, and that relationship by blood, whether that relationship arose from marriage or from illegitimate connexion, was the rule that interfered with and prevented the marriage of the parties.

The Jewish Law appears to have been to the same effect, for in Selden's Treatise, *de Jure naturali et Gentium juxta Disciplinam Hebræorum*, in the 5th Book, fol. 544, he says: " Quod vero ad fratrem et sororem attinet,
" eandem aiunt esse rationem fratris ex stupro seu adul-
" terio ab alterutro parente suscepti, et ejus qui thoro
" natus est legitimo; uti etiam sororis. Et quod de
" sorore habent, ex verbis illis Mosis, *Quæ nata est domi*
" *aut genita est foris*, eliciunt. Tantundem habent de
" amitâ et materterâ; diversum non esse, sive ex nuptiis
" sive ex stupro seu adulterio alterutrius parentis pro-
" gnatæ fuerint, modo ex naturalis sanguinis genere eum
" de cujus nuptiis quæritur contingant. Idem aiunt de
" filiâ sive ex uxore ante nuptias sive aliunde ex stupro
" aut adulterio genitâ."

He therefore shows what was the rule which the Jews regarded with respect to prohibitions; that they regarded those as relations who were born of the same family, whether the connexion was legitimate or illegitimate.

The rule seems to have been to a certain extent the same in the Civil Law. In *Cujacius*, 2nd vol., p. 1049, he says: " Imo et inter eos qui veniunt ex latere vel inter
" affines jure gentium incestum committitur. Et ex his,
" qui sunt a latere, constat sororem moribus uxorem duci
" non posse. Idem dicam de sororis filiâ, *l.* '*etiam si con-*
" *cubinam*,' *D. eod.* imo et de sororis aut fratris nepte vel
" pronepte, quia liberorum loco sunt. At *d. l. si adulte-*
" *rium*, *s.* 1, ait cum sororis filiâ jure civili incestum com-
" mitti. Respondeo, inter parentes et liberos jure gentium

" incestum committi in infinitum, nec enim in rectâ lineâ " ullo unquam gradu jure civili concessæ sunt nuptiæ. " Inter fratres quoque et sorores, jure gentium incestum " committitur: quia nec jure civili unquam inter eas " personas permissæ nuptiæ sunt, idcirco etiam vulgo " quæsitam sororem uxorem ducere non licet. Idem dicam " de socru, nuru, novercâ; nam hæc conjunctio semper " habita est pro nefariâ, etiam si qua in patris tantum " concubinatu fuisset."

The same rule, my Lords, appears in Voet, in his work upon the Pandects, the 23rd Book, and the 2nd Title, p. 33. He says this: "Certum utique est, non modo ex " justis nuptiis, sed ex vago concubitu descendentem " cognationem matrimonia impedire. Certum quoque, " non tantum ex matrimonio, sed et ex vetito cum mere- " trice congressu seu fornicatione eam nasci affinitatem, " quæ ex juris Canonici præcepto nuptiis impedimento " est, *cap.* 3; *cap.* 5; *cap.* 8: *extra. de eo, qui cognovit* " *consanguineam uxoris suæ vel sponsæ.* Covarruvias *de* " *matrimonio, part* 2, *cap.* 6, § 7, *num.* 3. Nec dubium, " quin jure Romano prope nefaria fuerit conjunctio, si " ea quæ in patroni fuerat concubinatu, deinde filii vel " nepotis concubina esse cœpisset, et ideo hujusmodi " facinus prohibendum fuerit ac stupri pœnâ coercendum. " Expeditum denique non modo serviles cognationes, sed " et affinitates, nuptias, per manumissos deinde contra- " hendas, effecisse interdictas, utcunque nec concubinatus " nec contubernium servorum, apud Romanos legitimæ " conjunctiones fuerint, aut nuptiarum effectus sortitæ " sint. Quibus consentaneum est, etiam hodie ob natam " ex illicito coitu qualemqualem affinitatem matrimonia " reprobari."

In Vinnius the same thing appears; for in his *Commentary, Book* 1, *title* 10, page 66; *De nuptiis*, and as to the number of persons to be regarded as within the prohibitions, there is this passage: "De eo ambigitur, an etiam " ex illegitimâ conjunctione contrahatur affinitas? Sed " dicendum est contrahi; nam si ex quovis coitu quantum- " vis illegitimo nascatur cognatio, cur non etiam affinitas " intelligatur? Sic certe a cognatione quæ ex contubernio

" servorum descendit affinitatem servilem Paulus arguit, " *l.* 14, *s.* 3, *hoc tit.* Neque ob aliam causam quam ob " affinitatem, prohibetur filius patris sui concubinam uxorem " ducere, *l.* 4, *c. eod.* aut in concubinatu habere." He thus shows the rule of the civil law, that where persons were united or connected together by blood, without reference to the legitimacy or illegitimacy of the connexion, that was an impediment to the marriage. It is clear that it was so by the canon law, and the authorities I have cited are I think sufficient to show that that rule, so adopted and laid down in various authorities both of the canon and civil law, has been and is to be regarded as the law of England. The courts of this country, the temporal courts, as well as the ecclesiastical, seem to have adopted it; and my Lord Stowell, in the decision to which I have referred, seems to regard it as settled.

And now, my Lords, I believe I have (I fear at immoderate length) carried your Lordships through, not only the reasons on which I consider myself entitled to your Lordships' judgment, but also the authorities by which I think those reasons are supported. I have shown that the statute of William IVth, whether it be looked at by the light of the statute law, or the ecclesiastical law, or the decisions of the courts of common law as explaining and affirming both, can be interpreted but in one way, and that that interpretation necessarily includes within the prohibited degrees the case of the marriage with the wife's sister. I have shown this with reference to the statute of 28 Henry VIIIth, cap. 7, which I submit is in force. I have shown it with respect to the 32nd Henry VIII., with reference to the term " Levitical " degrees," and with reference to the chapter of Leviticus itself. I have shown the proper mode—the mode always adopted—of interpreting that chapter of Leviticus, and that the objections which have been made to this mode of interpretation are of no force, that they have not been acted on, and that they are not recognized. I have shown that that statute of Henry VIII., and the decisions upon it, are not interfered with by the statute of Queen Mary, and that Queen Mary's statute cannot be allowed

to have any weight. And lastly, my Lords, I have shown that the ecclesiastical law of this country, from the earliest period to the present, has gone in one uniform course; and that whether before the Reformation, at the time of the Reformation, or since, the decisions have been uniform regarding marriage with a wife's sister as incestuous. I have then shown, not only that the authorities are all one way, and that they are all consistent, but that there is not a single authority, as far as I can discover, the other way; and not a single statute which really interferes with the construction for which I contend; and I have shown your Lordships, that upon the continent the rules of the canon law, the rules of the civil law, and the practice of other nations, concur and conspire with the decisions of the courts of this country, and that the illegitimacy of one of the parties makes no difference. I would ask your Lordships, therefore, whether a case can be put before you more clear or more conclusive than this?

My friend Mr. Foster, at the conclusion of his argument, mentioned that there were certain states upon the continent which had adopted a different practice, and had of late allowed marriage with a wife's sister. Be it so, my Lords;—in so doing they have broken the ancient rule of the Christian world, and set at nought the opinions of the more eminent Reformers, whom they most profess to venerate. We need not envy them their liberty, I should have rather said, their licence; for I believe that many of the more thinking persons in those countries are ready to admit that the consequences of the alteration have been by no means happy, and that they regret in vain the loss of that domestic familiarity and confidence, which are at once the comfort and the boast of England. My learned friend mentioned also that there are a number of persons in this country who have already contracted these marriages. If they have, we can only regret the fact. It can have no influence here, and I humbly submit that it ought to have no influence any where; because, my Lords, I believe that in those very districts where these marriages have been principally contracted,

quite as numerous instances might be found, if sought for, of persons who are living in the lowest and most degrading species of vice; and certainly, if the violations of a law are to be urged as an argument against the law itself, then I think the records of our criminal courts will show that neither our property, nor even our persons, are likely to be long secure. And perhaps, my Lords, if those who are curious in the statistics of incest examined the matter further, they would find how many of these marriages owe their origin to that unfortunate agitation which has of late prevailed upon this subject, and to that mischievous industry with which people have been taught to believe that these marriages are not illegal; for we know how readily those who are intent on the commission of any offence, particularly one against the laws of purity, are led to think that the offence is after all nothing, or that "the sin," in their case at least, is not "so exceeding "sinful."

But, my Lords, on these points it is unnecessary, and would be improper, for me to dwell. I have humbly placed before your Lordships, though I fear most imperfectly, the grounds on which I claim your Lordships' judgment in favour of the appellants. In your Lordships' hands I now leave the arguments I have ventured to advance, and I leave them with perfect confidence, though at the same time I cannot but express my most anxious hope, that your Lordships' judgment may pronounce these marriages illegal, as I firmly believe that such a judgment is of the utmost importance to the morals and to the peace of families, and with them to the happiness and well-being of the community.

THE END.

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